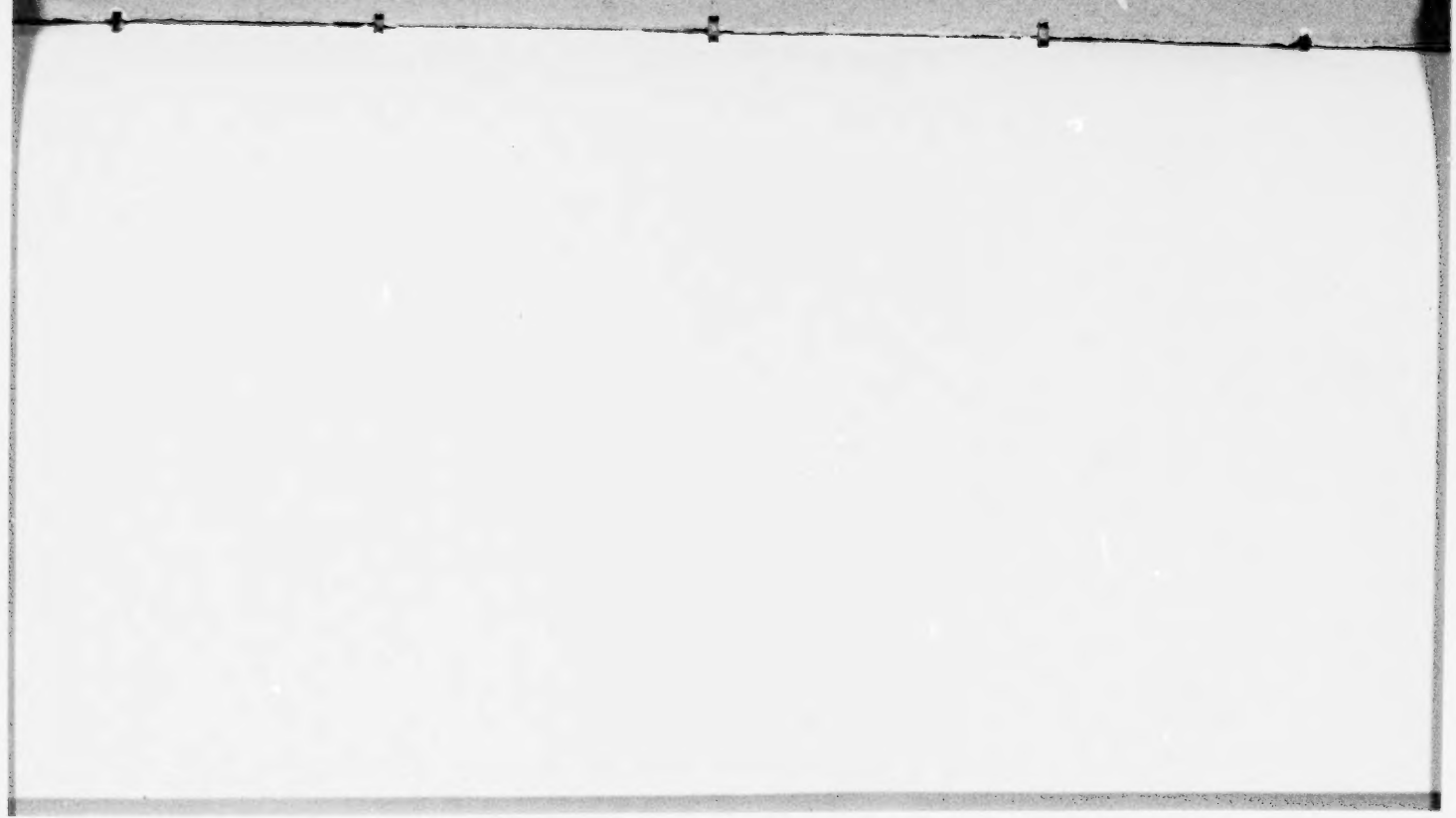

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# TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 539.

JOSEPH RALPH BURTON, PLAINTIFF IN ERROR,

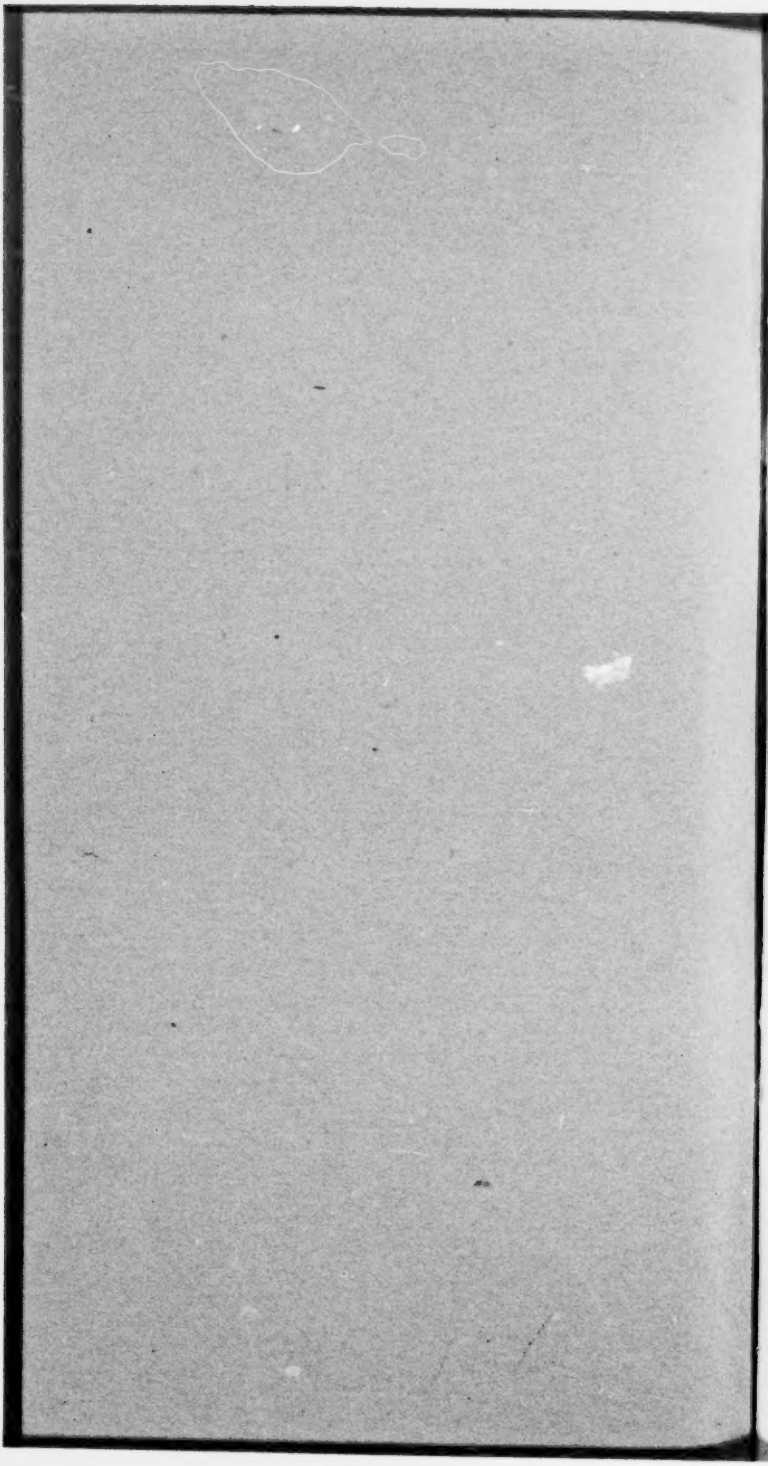
*vs.*

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED JANUARY 8, 1906.

(20,041.)



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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States, for the eastern division of the eastern judicial district of Missouri, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the September term, 1905, thereof, between the United States of America and Joseph Ralph Burton a manifest error hath happened, to the great damage of the said Joseph Ralph Burton as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the said record and proceedings aforesaid, at the city of Washington, and filed in the office of the clerk of the Supreme Court of the United States, on or before the 29th day of December 1905, to the end that the record and proceedings aforesaid being inspected, the Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 29th day of November in the year of our Lord one thousand nine hundred and five.

Issued at office in the city of St. Louis, with the seal of the circuit court of the United States for the eastern division of the eastern judicial district of Missouri, dated as aforesaid.

JAMES R. GRAY,
*Clerk Circuit Court United States, Eastern Division of the Eastern Judicial District of Missouri,*
By —— ——, *Deputy.*

Allowed by
WILLIS VAN DEVANTER, *Judge.*

1½ [Endorsed:] No. 5247. United States circuit court, eastern division of the eastern judicial district of Missouri. The United States *vs.* Joseph Ralph Burton. Writ of error to the circuit court of the United States, for the eastern division of the eastern judicial district of Missouri. Filed 29" day of Nov., 1905. James R. Gray, clerk.

*Return to Writ.*

UNITED STATES OF AMERICA,
*Eastern Division of the Eastern Judicial District of Missouri, ss:*

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified tran-

script of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereto subscribe my name, and affix the seal of said circuit court, at office in the City of St. Louis, this 3rd day of January, A. D. 1906.

(Seal of the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri.)

JAMES R. GRAY,
*Clerk of said Court.*

Security having been given as required by law this writ of error will upon due service operate as a supersedeas.

St. Louis, Missouri, November 28th, 1905.

WILLIS VAN DEVANTER,
*Circuit Judge.*

ST. LOUIS, MISSOURI, *November 29th*, 1905.

Full and complete service of the within writ of error accepted the day and date above written.

DAVID P. DYER,
*U. S. Att'y.*

2 THE UNITED STATES OF AMERICA:

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear in the United States Supreme Court at Washington D. C., thirty days from and after the day this citation bears date, pursuant to a writ of error, filed in the Clerk's office of the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, wherein Joseph Ralph Burton is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf

Witness, the Honorable Willis Van Devanter Judge of the Circuit Court of the United States for the Eastern District of Missouri, this 29th day of November in the year of our Lord one thousand nine hundred and five.

WILLIS VAN DEVANTER,
*United States Circuit Judge, Eighth Circuit.*

2½ [Endorsed:] No. 5247 United States Circuit Court, Eastern Division of the Eastern Judicial District of Missouri. The United States *vs.* Joseph Ralph Burton Citation. Filed November 29th 1905. James R. Gray clerk.

ST. LOUIS, MISSOURI, *November 29th*, 1905.

Full and complete service of the within citation accepted the day and date above written.

DAVID P. DYER,
*U. S. Att'y.*

3 UNITED STATES OF AMERICA,
*Eastern Division of the Eastern Judicial District of Missouri, ss:*

Be it remembered: That heretofore to-wit: on the tenth day of November in the year of our Lord nineteen hundred and five: The Grand Jurors of the United States of America, in and for the Eastern Division of the Eastern Judicial District of Missouri, returned into the District Court of said United States, in and for said Division of said District, An Indictment in this cause against the said defendant, endorsed, "A true bill, Alfred Clifford, Foreman Grand Jury," which said Indictment is in the words and figures following, to-wit:—

(*Indictment.*)

"In the Circuit Court of the United States of America for the Eastern District of Missouri, Eastern Division. Of the September Term in the Year of Our Lord Nineteen Hundred and Five.

EASTERN DISTRICT OF MISSOURI, *Eastern Division, set:*

The grand jurors for the United States of America, inquiring for the Eastern Division of the Eastern District of Missouri, upon their oath present, that, before and at the time of the committing of the offense hereafter in this count of this indictment mentioned Joseph Ralph Burton was a Senator of the said United States of and for the State of Kansas; that before and on the eighteenth day of November, in the year of our Lord nineteen hundred and two, the Rialto Grain and Securities Company, a corporation then existing under that name, was pretending to carry on the business of buying,
4 selling and dealing in grain and securities, amongst other things, on its own account and as agent for others, and of making investments of money for other in such commodities on speculation, with its principal office located at the city of St. Louis; and that before and on the day aforesaid there had been and was pending before the Post Office Department of the said United States, and before a certain officer of that department, to-wit, the then Postmaster-General of the said United States, a certain proceeding matter and thing in which the said United States was then directly interested, that is to say, a proceeding for determining the questions whether the said corporation had been and was engaged in conducting a scheme for obtaining money from persons then resident in divers parts of the said United States, through the mails of the said United States, by means of false and fraudulent pretenses, representations and promises, made by the said corporation to those persons, to the effect that it would invest such moneys as might be sent to it for that purpose in grain, and endeavor in good faith so to invest such moneys as speedily to make substantial profits for the persons so sending the same, and make returns of such moneys or profits to such persons, and not convert such moneys to its own use,—and whether the said Postmaster-General should instruct the

postmaster at the post-office of the said United States at St. Louis aforesaid, it being a post-office at which registered letters were then arriving directed to the said corporation, to return all such registered letters to the several postmasters at the several post-offices at which the same were or thereafter should be originally mailed, with the word "FRAUDULENT" plainly written or stamped upon the outside thereof, to be by such postmasters returned to the writers thereof, and in the same manner to dispose of all letters and matter sent by mail to the said post-office directed to the said corporation, all of which the said Postmaster-General might then have lawfully done, upon evidence satisfactory to him that the said corporation had been and was conducting such a scheme to defraud,—and whether the said Postmaster-General should forbid the payment, by the said postmaster at St. Louis aforesaid, to the said corporation, of all postal money orders drawn to its order, or in its favor, and require the return to the several remitters thereof of the several sums named in such money orders, as the said Postmaster-General might also then lawfully have done, upon evidence satisfactory to him that the said corporation had been and was engaged in conducting such scheme to defraud as the one in this count mentioned; and, further, that before and on the day in this count first aforesaid the facts pertaining to the questions in this count mentioned had been and were under investigation by the said Post-Office Department and the said Postmaster-General, and on that day the said questions were still undetermined by the said Postmaster-General.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that the said Joseph Ralph Burton, Senator as aforesaid, afterwards, to wit, on the said eighteenth day of November, in the year of our Lord nineteen hundred and two, and after his election as such Senator, and during his continuance in office as such Senator, at St. Louis aforesaid, in the division and district aforesaid, then well knowing the said proceeding, matter and thing in which the said United States was directly interested to be, as it then still was, pending as aforesaid before and undetermined by the said Post-Office Department and Postmaster-General, and then well knowing the character of the said proceeding, matter and thing, and that the said United States was then directly interested in the same, and then well knowing all the premises, unlawfully did agree with the said Rialto Grain and Securities Company, corporation as aforesaid to receive directly from the said corporation certain compensation for himself, to wit, the sum of twenty-five hundred dollars in lawful money of the said United States, for certain services to be rendered by him the said Joseph Ralph Burton to the said corporation, in relation to the same proceeding, matter and thing in which the said United States was then directly interested as aforesaid, before the said Post-Office Department and Postmaster-General, while the said proceeding, matter and thing was and should be still pending and the questions relating thereto still undetermined before and by the said Post-Office Department and Postmaster-General, and after his the said Joseph Ralph Burton's election as such

Senator, and during his continuance in office as such Senator,—that is to say, services consisting of his the said Joseph Ralph Burton's appearing before the said Post-Office Department, and before the said Postmaster-General, as an agent of and attorney for the said Rialto Grain and Securities Company, corporation as aforesaid, and by the influence of his presence and of his office as such Senator, and by representations, statements and persuasion, inducing the said Postmaster-General to believe that the said corporation had not been and was not conducting any such scheme as that herein above mentioned, and to put a stop to any further investigation of the questions aforesaid by the said Post Office Department, and to refrain from determining the same adversely to the interests of the said corporation, and from instructing the said postmaster at the said post-office
7 at St. Louis aforesaid to return the registered letters, and other letters and matter sent by mail aforesaid to the postmasters at the offices at wh-ch they were or should be originally mailed as aforesaid, with the word "fraudulent" plainly written or stamped upon the outside thereof as aforesaid, to be by such postmasters returned to the writers thereof as aforesaid, and also from forbidding the payment to the said corporation, by the said postmaster at the post-office at St. Louis aforesaid, of postal money-orders drawn to its order, or in its favor; and thereby the said Joseph Ralph Burton, against the peace and dignity of the said United States, then and there unlawfully did offend against section seventeen hundred and eighty-two of the Revised Statutes of the said United States.

## Second Count.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that on the said eighteenth day of November, in the year of our Lord nineteen hundred and two the said Joseph Ralph Burton was a Senator of the said United States of and for the said State of Kansas, having been theretofore duly elected by the legislature of that state for a term of six years, expiring on the fourth day of March, in the year of our Lord nineteen hundred and seven, and in pursuance of such election had duly qualified and been admitted to the Senate of the said United States, and then was acting as such Senator; that on the day in this count of this indictment first mentioned, the said Rialto Grain and Securities Company, a corporation then existing under that name, had been and was pretending to carry on the business of a general broker, and of buying, selling and dealing in grain and securities, on its own account and as agent for others, and of making investments of money in such commodities on speculation, with its principal offices located at the said city of St. Louis, in the said State of Missouri; and that
8 before and on the day in this count first aforesaid there was pending before the Post Office Department of the said United States, and before a certain officer of that department, to wit, the then Postmaster-General of the said United States, a certain proceeding in which the said United States was then directly and indirectly interested, that is to say, a proceeding for determining the questions

whether the said corporation then had been and was engaged in conducting a scheme for obtaining money from persons then resident in divers parts of the said United States, through the mails of the said United States, by means of false and fraudulent pretenses, representations and promises, made by the said corporation to those persons, to the effect that it would invest such moneys as should be sent to it for investment in grain, and endeavor in good faith so to invest such moneys in grain as speedily to make substantial profits for the persons so sending the same, and account for said moneys to said persons and not convert said moneys to its own use,—and whether the said Postmaster-General should instruct the postmaster at the post-office of the said United States at St. Louis aforesaid, the same then being a post-office at which registered letters were then arriving, directed to the said corporation, to return all such registered letters to the several postmasters at the several post-offices at which they were or should thereafter be originally mailed, with the word "Fraudulent" plainly written or stamped upon the outside thereof, to be by such postmasters returned to the writers thereof, and in the same manner to dispose of all other letters and matter sent by mail to the said post-office directed to the said corporation, all of which the said Postmaster General might then have lawfully done, upon evidence satisfactory to him that the said corporation had been and was conducting such a scheme to defraud,—and

95. whether the said Postmaster-General should forbid the payment, by the said postmaster at St. Louis, to the said corporation, of all postal money orders drawn to its order, or in its favor, and require the return to the several remitters thereof of the several sums named in such money orders, in the manner provided by the said regulations, as the said Postmaster-General might also then have lawfully done, upon evidence satisfactory to him that the said corporation was engaged in conducting such a scheme to defraud as that in this count mentioned; and, further, that before and on the day in this count first aforesaid the facts pertaining to the questions in this count mentioned were under investigation by the said Post-Office Department and the said Postmaster-General, and on that day were still undetermined by the said Postmaster-General.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that the said Joseph Ralph Burton, Senator as in this count of this indictment aforesaid, on the said eighteenth day of November, in the year of our Lord nineteen hundred and two, after his said election as such Senator, and during his continuance in office as such Senator, at St. Louis aforesaid, in the division and district aforesaid, then well knowing the proceeding in this count mentioned, in which the said United States was then directly and indirectly interested, to be, as it then still was, pending as last aforesaid before the said Post Office Department and the said Postmaster-General and undetermined by the said Postmaster-General, and then well knowing the character of that proceeding and that the said United States was then directly and indirectly interested in the same proceeding as last aforesaid, and then well knowing all the

premises in this count set forth, unlawfully did agree, with the said Rialto Grain and Securities Company, corporation as aforesaid, to receive directly from that corporation certain other compensation, to wit, the sum of twenty-five hundred dollars in lawful money of the said United States, for certain services to be rendered by him the said Joseph Ralph Burton to the said corporation, in relation to the last mentioned proceeding in which the said United States was then directly and indirectly interested as aforesaid, before the said Post-Office Department and before the said Postmaster-General, while the same proceeding was and should be still pending before the said Post-Office Department and the said Postmaster-General and still undetermined by the said Postmaster-General, and after his the said Joseph Ralph Burton's said election as such Senator, and during his continuance in office as such Senator,—that is to say, services consisting of his the said Joseph Ralph Burton's appearing before the said Post Office Department, and before the said Postmaster-General, as an agent of and attorney for the said corporation and, by the influence of his presence and of his office as such Senator, and by statements, representations and persuasion, inducing the said Postmaster-General to believe that the said corporation had not conducted and was not conducting any such scheme to defraud as that last above mentioned, and to put a stop to any further investigation of the questions in this count mentioned by the said Post Office Department and by the said Postmaster-General, and to refrain from determining the same adversely to the interests of the said corporation, and from instructing the said postmaster at the said post-office at St. Louis aforesaid to return the registered letters, and other letters and matter sent by mail aforesaid to the postmasters at the offices at which they were or should thereafter be originally mailed as aforesaid, with the word "Fraudulent" plainly written or stamped upon the outside thereof as aforesaid, to be by such postmasters returned to the writers thereof as aforesaid, and also from forbidding the payment to the said corporation, by the said postmaster at the said post-office at St. Louis aforesaid, of postal money orders drawn to its order, or in its favor.

And so the grand jurors aforesaid, upon their oath aforesaid, do say, that the said Joseph Ralph Burton, at the time and place and in the manner and form in this count of this indictment aforesaid, unlawfully did offend against section seventeen hundred and eighty-two of the Revised Statutes of the said United States, against the peace and dignity of the said United States.

## Third Count.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that on the twenty-sixth day of March, in the year of our Lord, nineteen hundred and three, the said Joseph Ralph Burton, then still being a Senator of the said United States of and for the said State of Kansas, as in the second count of this indictment set forth, and having, after his election as such Senator and during his con-

tinuance in office, to wit, on divers days between the said eighteenth day of November, in the year nineteen hundred and two, and the day in this count first aforesaid, rendered the services in the second count described, to the corporation in that count mentioned, before the Department and officer there named, and the same having been, as he the said Joseph Ralph Burton, when so rendering the same, well knew, services in relation to the proceeding described in the said second count, in which the said United States was then di-
12 rectly and indirectly interested, pending, as he the said Joseph Ralph Burton also well knew, before the said Department and officer, unlawfully did, after his said election and during his continuance in office, at St. Louis aforesaid, in the said Eastern Division of the said Eastern District of Missouri, receive directly from the said corporation certain compensation for the same services, that is to say, five hundred dollars; he the said Joseph Ralph Burton, when so receiving such compensation for the said services, well knowing the same to have been services in relation to a proceding pending before a Department and an officer of the said United States, and well knowing the said proce-ding to have been a proceeding in which the said United States was directly and indirectly interested, and one pending before the said Post-Office Department and Postmaster-General, and undetermined by the said Postmaster-General, as in the said second count more fully set forth: against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

Fourth Count.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that on the said eighteenth day of November, in the year of our Lord nineteen hundred and two, the said Joseph Ralph Burton was a Senator of the said United States of and for the said State of Kansas, having before then been duly elected by the legislature of that State for a term of six years expiring on the fourth day of March, in the year nineteen hundred and seven, and in pursuance of such election, had duly qualified as such Senator and been admitted to the Senate of the said United States, and before then was and from thence hitherto has been acting as such Senator; that on the day in this count of this indictment first mentioned, the said Rialto
13 Grain and Securities Company, a corporation theretofore organized and then existing under and by virtue of the laws of the State of Missouri, had been and then was pretending to carry on the business of a general broker, and of buying, selling and dealing in grain and securities, on its own account and as agent for others, and of making investments of the moneys of others in such commodities on specuation, with its principal offices located in the city of St. Louis, in the said State of Missouri; and that before and on the day in this count first aforesaid there was pending before the Post-Office Department and the Postmaster-General of the said United States, a certain proceeding in which the said United States was then directly interested, that is to say, a proceeding for determining the questions

whether the corporation in this count mentioned then was engaged in conducting a scheme for obtaining money from persons then resident in divers of the States of this Union, by means of false and fraudulent pretenses, representations and promises, made by the said corporation to those persons in connection with the carrying on of its said pretended business, to the effect that it would invest such moneys as should be sent to it for investment in grain by the persons aforesaid, and endeavor in good faith so to invest such moneys in grain as speedily to make substantial profits for the persons so sending the same, and account for such moneys to such persons and not convert the same to its own use,—and whether the said Postmaster-General should instruct the postmaster at the post-office of the United States at St. Louis aforesaid, it being a post-office at which registered letters were then arriving directed to the said corporation, to return all such registered letters to the several postmasters at the several post-offices at which the same were or thereafter should be originally mailed,
14 with the word "Fraudulent" plainly written or stamped upon the outside thereof, to be by such postmasters returned to the writers thereof, and in the same manner to dispose of all other letters and matter sent by mail to the said post-office directed to the said corporation, all of which the said Postmaster-General might then have lawfully done, upon evidence satisfactory to him that the said corporation was conducting such a scheme to defraud,—and whether the said Postmaster-General should forbid the payment, by the said postmaster at St. Louis aforesaid, to the said corporation, of all postal money orders drawn to its order, or in its favor, and require the return to the several remitters thereof of the several sums named in such money orders, as the said Postmaster-General might also then have lawfully done, upon evidence satisfactory to him that the said corporation was engaged in conducting such a scheme to defraud as the one in this count mentioned; and, further, that before and on the day in this count first aforesaid the facts pertaining to the questions in this count mentioned had been and were under investigation by the said Post-Office Department and the said Postmaster-General, and on that day the said questions were still undetermined by the said Postmaster-General.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that the said Joseph Ralph Burton, Senator as in this count of this indictment aforesaid, on the said eighteenth day of November, in the year of our Lord nineteen hundred and two, after his election as such Senator, and during his continuance in office as such Senator, at St. Louis aforesaid, in the division and district in the first count of this indictment aforesaid, then well knowing the proceeding in which the said United States was then directly interested in this count of this indictment mentioned to be, as it then still was,
15 pending as last aforesaid before the said Post-Office Department and the said Postmaster-General, and undetermined by the said Postmaster-General as last aforesaid, and then well knowing the character of that proceeding and that the said United States was then directly interested in the same proceeding, and then well knowing all the premises, unlawfully did agree, with the said

Rialto Grain and Securities Company, corporation as last aforesaid, to receive directly from that corporation certain other compensation, to wit, the sum of twenty-five hundred dollars in lawful money of the said United States, for certain services thereafter to be rendered by him the said Joseph Ralph Burton to the said corporation, in relation to the last-mentioned proceeding, in which the said United States was then directly interested as aforesaid, before the said Postmaster-General, while the same proceeding was pending before the said Post-Office Department and the said Postmaster-General and while the said proceeding and the said questions pertaining thereto as in this count aforesaid were still undetermined by the said Postmaster-General, and after his the said Joseph Ralph Burton's said election as such Senator, and during his continuance in office as such Senator,—that is to say, services to consist of his the said Joseph Ralph Burton's appearing before the said Postmaster-General as an agent of and attorney for the said corporation and, by the influence of his presence and of his office as such Senator and of his interest in the said corporation, and by statements, representations and persuasion, inducing the said Postmaster-General to believe that the said corporation was not conducting any such scheme to defraud as the one in this count mentioned, or any scheme to defraud, and to put a stop to any further investigation of the questions in this count mentioned by the said Post-Office Department and Postmaster-General, and to refrain from determining the same adversely to the interests
16 of the said corporation, and from instructing the *the* said postmaster at the said post-office at St. Louis aforesaid to return registered letters and other letters and matter sent by mail to the postmasters at the post-offices at which the same were or should thereafter be originally mailed as aforesaid, to be by such postmasters returned to the writers thereof as aforesaid, and also from forbidding the payment to the said corporation, by the said postmaster at the said post-office at St. Louis aforesaid, of postal money orders drawn to the order of the said corporation, or in its favor, and to determine the said proceeding and questions favorably to the interests of the said corporation.

And so the grand jurors aforesaid, upon their oath aforesaid, do say, that the said Joseph Ralph Burton, at the time and place and in manner and form in this count of this indictment aforesaid, unlawfully did offend against section seventeen hundred and eighty-two of the Revised Statutes of the said United States; against the peace and dignity of the said United States.

## Fifth Count.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that on the said twenty-sixth day of March, in the year of our Lord nineteen hundred and three, the said Joseph Ralph Burton, then still being a Senator of the said United States for the said State of Kansas as in the fourth count of this indictment set forth, and having, after his election as such Senator and during his continuance in office, to wit, on divers days between the said eigh-

teenth day of November, in the year of our Lord nineteen hundred and two, and the said twenty-sixth day of March, in the year of our Lord nineteen hundred and three, rendered the services in
17 the said fourth count described, to the corporation in that count mentioned, before the Postmaster-General of the said United States and before the said Post Office Department, and the same having been, as he the said Joseph Ralph Burton, when so rendering the same, well knew, services in relation to the proceeding described in the said fourth count, in which the said United States was then directly interested, pending as he the said Joseph Ralph Burton also well knew, before the said Post-Office Department and Postmaster-General unlawfully did, after his said election and during his continuance in office, at St. Louis aforesaid, in the said Eastern Division of the said Eastern District of Missouri, receive directly from the said corporation certain compensation for the same services, that is to say, five hundred dollars; he the said Joseph Ralph Burton, when so receiving such compensation for the said services, well knowing the same to have been services in relation to a proceeding pending before a Department and before an officer of the Government of the said United States, and well knowing the said proceeding to have been a proceeding in which the United States was directly interested, and one pending before the said Post-Office Department and Postmaster-General, and undetermined by the said Postmaster-General, as in the said fourth count is more fully set forth; against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

## Sixth Count.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that on the said eighteenth day of November, in the year of our Lord nineteen hundred and two, the said Joseph Ralph Burton was a Senator of the said United States of and for the
18 said State of Kansas, having been theretofore duly elected by the legislature of that state for a term of six years, expiring on the fourth day of March, in the year of our Lord nineteen hundred and seven, and in pursuance of such election had duly qualified and been admitted to the Senate of the said United States, and then was acting as such Senator; that on the day in this count of this indictment first mentioned, the said Rialto Grain and Securities Company, a corporation then existing under that name, had been and was pretending to carry on the business of a general broker, and of buying, selling and dealing in grain and securities, on its own account and as agent for others, and of making investments of money in such commodities on speculation, with its principal offices located at the said city of St. Louis, in the said State of Missouri; and that before and on the day in this count first aforesaid there was pending before the Post Office Department of the said United States and before a certain officer of that Department, to wit, the then Postmaster-General of the said United States, a certain proceeding in which the said United States was then indirectly interested, that is to say, a

proceeding for determining the questions whether the said corporation was engaged in conducting a scheme for obtaining money from persons then resident in divers parts of the said United States, through the mails of the said United States by means of false and fraudulent pretenses, representations and promises, made by the said corporation to those persons, to the effect that it would invest such moneys as should be sent to it for investment in grain, and endeavor in good faith so to invest such moneys in grain as speedily to make substantial profits for the persons so sending the same, and account for said moneys to said persons and not convert said moneys to its own use,—and whether the said Post-
19 master-General should instruct the postmaster at the post-office of the said United States at St. Louis aforesaid, the same then being a post-office at which registered letters were then arriving, directed to the said corporation, to return all such registered letters to the several postmasters at the several post-offices at which they were or should thereafter be originally mailed, with the word "fraudulent" plainly written or stamped upon the outside thereof, to be by such postmasters returned to the writers thereof under the regulations of the said Post Office Department, and in the same manner to dispose of all other letters and matter sent by mail to the said post-office directed to the said corporation, all of which the said Postmaster-General might then have lawfully done, upon evidence satisfactory to him that the said corporation was engaged in conducting such a scheme to defraud as that in this count mentioned; and, further, that before and on the day in this count first aforesaid the facts pertaining to the questions in this count mentioned were under investigation by the said Post Office Department and the said Postmaster-General and on that day were still undetermined by the said Postmaster-General.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that the said Joseph Ralph Burton, Senator as in this count of this indictment aforesaid, on the said eighteenth day of November, in the year of our Lord nineteen hundred and two, after his said election as such Senator, and during his continuance in office as such Senator, at St. Louis, aforesaid, in the Division and District aforesaid, then well knowing the proceedings in this count mentioned, in which the United States was then indirectly
20 interested, to be, as it then still was, pending as last aforesaid, before the said Post Office Department and the said Postmaster-General and undetermined by the said Postmaster General, and then well knowing the character of that proceeding, and that the said United States was then indirectly interested in the same proceeding as last aforesaid, and then well knowing all the premises in this count set forth, unlawfully did agree, with the said Rialto Grain and Securities Company, corporation as aforesaid, by and through its officers, agents and attorneys, to receive directly from that corporation through its officers, agents and attorneys, certain other compensation, to-wit: the sum of twenty five hundred dollars lawful money of the said United States, for certain services to be rendered by him, the said Joseph Ralph Burton to the said cor-

poration, in relation to the last mentioned proceeding in which the said United States was then indirectly interested as aforesaid, before the said Post Office Department and before the said Postmaster General, while the same proceeding was and should still be pending before the said Post Office Department and the said Postmaster General and still undetermined by the said Postmaster General, and after his the said Joseph Ralph Burton's said election as such Senator, and during his continuance in office as such Senator,—that is to say, services consisting of his the said Joseph Ralph Burton's appearing before the said Post Office Department, and before the said Postmaster General, the Chief Post Office Inspector, and the Assistant Attorney General for said Post Office Department, and other officers of said Post Office Department, as an agent of and attorney for the said corporation, and obtaining information for said corporation concerning said proceeding in
21 this count mentioned, in which the United States was then indirectly interested, and by the influence of his presence and of his office as such Senator, and by statements, representations and persuasion, inducing the said Postmaster General to believe that the said corporation was not conducting any such scheme to defraud as that last above mentioned, and to put a stop to any further investigation of the questions in this count mentioned by the said Post Office Department and by the said Postmaster General, and to refrain from determining the same adversely to the interests of the said corporation, and from instructing the said postmaster at the said post office at St. Louis aforesaid to return the registered letters, and other letters and matter sent by mail aforesaid to the postmasters at the post offices at which they were or should thereafter be originally mailed as aforesaid, with the word "Fraudulent" plainly written or stamped upon the outside thereof, as aforesaid, to be by such postmasters returned to the writers thereof as aforesaid, and also from forbidding the payment to the said corporation, by the said postmaster at the post office at St. Louis, aforesaid, of postal money orders drawn to its order, or in its favor.

And so the Grand Jurors aforesaid, upon their oath aforesaid, do say, that the said Joseph Ralph Burton, at the time and place, and in manner and form in this count of this indictment aforesaid, unlawfully did offend against section seventeen hundred and eighty-two of the Revised Statutes of the said United States, against the peace and dignity of the said United States.

## Seventh Count.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that on the said twenty-sixth day of March,
22 in the year of our Lord nineteen hundred and three, the said Joseph Ralph Burton, then still being a Senator of the said United States for the said State of Kansas as in the sixth count of this indictment set forth, and having, after his election as such Senator and during his continuance in office, to wit, on divers days between the said eighteenth day of November, in the year of our

Lord nineteen hundred and two, and the said twenty-sixth day of March, in the year of our Lord nineteen hundred and three, rendered the services in the said sixth count described, to the corporation in that count mentioned, before the Postmaster-General of the said United States and before the said Post Office Department, and the same having been, as he the said Joseph Ralph Burton, when so rendering the same, well knew, services in relation to the proceeding described in the said sixth count, in which the said United States was indirectly interested, pending, as he the said Joseph Ralph Burton also well knew, before the said Post Office Department and Postmaster-General, unlawfully did, after his said election and during his continuance in office, at St. Louis aforesaid, in the said Eastern Division of the said Eastern District of Missouri, receive directly from the said corporation through its officers, agents and attorneys, certain compensation for the same services, that is to say, five hundred dollars; he the said Joseph Ralph Burton, when so receiving such compensation for the said services, well knowing the same to have been services in relation to a proceeding pending before a Department and before an officer of the Government of the said United States, and well knowing the said proceeding to have been a proceeding in which the said United States was indirectly interested, and one pending before the said Post Office Department and Postmaster General, and undetermined by the said Postmaster General, as in the said sixth count is more fully set forth:
23 against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

## Eighth Count.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present, that on the said eighteen- day of November, in the year of our Lord nineteen hundred and two, the said Joseph Ralph Burton, was a Senator of the said United States of and for the said State of Kansas, having been theretofore duly elected by the legislature of that state for a term of six years, expiring on the fourth day of March, in the year of our Lord nineteen hundred and seven, and in pursuance of such election had been duly qualified and been admitted to the Senate of the said United States, and then was acting as such Senator; that on the day in this count of this indictment first mentioned, the said Rialto Grain & Securities Company, a corporation then existing under that name, had been and was pretending to carry on the business of a general broker, and of buying, selling and dealing in grain and securities, on its own account and as agent for others, and of making investments of money in such commodities on speculation, with its principal offices located at the said city of St. Louis, in the said State of Missouri; and that before and on the day in this count first aforesaid there was pending before the Post Office Department of the said United States and before a certain officer of that Department, to-wit: the then Postmaster General of the said United States, a certain proceeding in which the

said United States was then indirectly interested, that is to say, a proceeding for determining the questions whether the said corporation was engaged in conducting a scheme for obtaining money from persons then resident in divers parts of the said United States through the mails of the said United States, by means of false and fraudulent pretenses, representations and promises, made by the said corporation to those persons, to the effect that it would invest such moneys as should be sent to it for investment in grain, and endeavor in good faith so to invest such moneys in grain as speedily to make substantial profits for the persons so sending the same, and account for said moneys to said persons and not convert said moneys to its own use—and whether the said Postmaster General should instruct the post-master at the post office of the said United States at St. Louis, aforesaid, the same then being a post office at which registered letters were then arriving, directed to the said corporation, to return all such registered letters to the several postmasters at the several post offices at which they were or should thereafter be originally mailed, with the word "Fraudulent" plainly written or stamped upon the outside thereof to be by such postmasters returned to the writers thereof under the regulations of the said Post Office Department, and in the same manner to dispose of all other letters and matter sent by mail to the said post office directed to the said corporation, all of which the said Postmaster General might then have lawfully done, upon evidence satisfactory to him, that said corporation was engaged in conducting such scheme to defraud as that in this count mentioned; and further, that before and on the day in this count first aforesaid the facts pertaining to the questions in this count mentioned were under investigation by the said Post Office Department, and the said Postmaster General, and on that day were still undetermined by the said Postmaster General.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present: that the said Joseph Ralph Burton, Senator as in this count of this indictment aforesaid, on the said eighteenth day of November, in the year of our Lord nineteen hundred and two, after his said election as such Senator, and during his continuance in office as such Senator, at St. Louis, Missouri, aforesaid, in the division and district aforesaid, unlawfully did agree with the said Rialto Grain & Securities Company, corporation, as aforesaid, by and through its officers, agents and attorneys, to receive directly from that corporation, through its officers, agents and attorneys, certain other compensation to-wit: the sum of twenty five hundred dollars in lawful money of the said United States, for certain services to be rendered by him the said Joseph Ralph Burton to said corporation in relation to the last mentioned proceeding in which the said United States was then indirectly interested as aforesaid, before the said Post Office Department and before the said Postmaster General, while the same proceeding was and should still be pending before the said Post Office Department and the said Postmaster General and still undetermined by the said Postmaster General, and after his the said Joseph Ralph Burton's said election as such Senator, and during his continu-

ance in office as such Senator,—that is to say, services consisting of his the said Joseph Ralph Burton's appearing before the said Post Office Department, the Chief Post Office Inspector, and the Assistant Attorney General for said Post Office Department, and other officers of said Post Office Department, as an agent of and attorney for said corporation, and obtaining information for said corporation concerning said proceeding in this count mentioned, in which the United States was then indirecty interested, and by the influence of his presence and of his office as such Senator, and by statements representations and persuasion, inducing the said Postmaster General to believe that the said corporation was not conducting any such scheme to defraud as that last above mentioned, and to put a stop to any
26 further investigation of the questions in this count mentioned by the said Post Office Department and by the said Postmaster General, and to refrain from determining the same adversely to the interests of the said corporation, and from instructing the said postmaster at the said post office at St. Louis aforesaid to return the registered letters, and other letters and matter sent by mail aforesaid to the postmasters at the post offices at which they were or should thereafter be originally mailed as aforesaid, with the word "Fraudulent" plainly written or stamped upon the outside thereof as aforesaid, to be by such postmasters returned to the writers thereof, as aforesaid, and also from forbidding the payment to the said corporation, by the said postmaster at the post office at St. Louis aforesaid, of postal money orders drawn to its order or in its favor.

And so the Grand Jurors aforesaid, upon their oath aforesaid, do say, that the said Joseph Ralph Burton, at the time and place, and in manner and form in this count of this indictment aforesaid, unlawfully did offend against section seventeen hundred and eighty two of the Revised Statutes of the said United States, against the peace and dignity of the said United States.

DAVID P. DYER.
*United States Attorney.*

Endorsed: "No. 5247. United States Circuit Court, Eastern Division, Eastern District of Missouri. The United States *vs.* Joseph Ralph Burton. Indictment for Violation of Sec. 1782. A True Bill. Alfred Clifford, Foreman Grand Jury. Filed Nov. 10 1905, James R. Gray, Clerk."

27 And afterwards, to-wit: on the 11th day of November, A. D. 1905, the following further proceedings were had and appear of record in said cause, as follows, to-wit:—

5247

UNITED STATES, Plaintiff,
*vs.*
JOSEPH RALPH BURTON, Defendant.

Now comes the United States by the District Attorney, and the defendant appears in his own proper person and by his attorneys, and

thereupon it is ordered that the defendant be granted until the morning of November 14, 1905, to present a motion to quash, demurrer, or other proceeding questioning the indictment herein, and that this cause be set down for trial for November 20, 1905.

And afterwards, to-wit: on the 14th day of November, 1905, the following further proceedings were had and appear of record in said cause, as follows, to-wit:—

(*Demurrer Filed, Argued and Submitted.*)

5247.

UNITED STATES, Plaintiff,
*vs.*
JOSEPH RALPH BURTON, Defendant.

The demurrer to the indictment this day filed herein is argued by counsel and submitted to the Court.

Which said demurrer to the Indictment is in words and figures as follows, to-wit:—

(*Demurrer.*)

In the Circuit Court of the United States, Eastern Division of the Eastern Judicial District of Missouri.

28 *Demurrer to the Indictment.*

THE UNITED STATES
*vs.*
JOSEPH RALPH BURTON.

Comes now the defendant and demurs to the indictment herein and to each and every count thereof, and says that neither of said counts is sufficient in law to require him to answer thereto, and as grounds of said demurrer, the defendant says that:

I.

The said indictment and each and every count thereof fails to aver that there was pending before the Postal Department of the United States or any official thereof any matter, thing or proceeding in which the United States was interested or to which it was a party.

II.

The said indictment and each and every count thereof fails to state facts showing any offense by the defendant against any statute of the United States.

III.

The said indictment and each and every count thereof fails to inform the defendant of the nature and cause of his accusation as required by the sixth article of amendment to the Constitution of the United States.

IV.

The said indictment and each and every count thereof fails to aver any facts showing that there was any matter, thing, cause or proceeding pending before the Postal Department of the United States or any official thereof.

V.

The said indictment and each and every count thereof fails to state what services were rendered by defendant or that
29 he rendered or agreed to render any services whatever.

VI.

The fourth and fifth counts of said indictment, and each of them, fail to show that there was any matter, thing or proceeding pending which the Postmaster General had any jurisdiction to determine.

VII.

The eighth count of said indictment fails to show that defendant had any knowledge of the pendency of the proceeding in said count set forth, or that he had any knowledge of any of the matters and things set forth in said count respecting the Rialto Grain and Securities Company, or that any of the acts therein charged to have been done by defendant were done with knowledge of any of the other facts set forth in said count.

VIII.

The first, second, fourth, sixth and eighth counts of said indictment fail to aver that defendant agreed or undertook to render the services in said counts or either of them mentioned, or that he knew at the time of making the agreements in said counts mentioned that the services to be rendered or to be required of him were to consist of any of the acts or things in said counts or either of them mentioned, or that defendant ever agreed to do any of said acts or things, or that defendant knew that the doing of any of the acts or things in said count alleged to be done by him would or could in any manner influence the action of the Postmaster General or of any official of the Postal Department.

IX.

The third, fifth and seventh counts of the said Indictment fail to aver that any services were rendered by defendant, or that any act or thing was done by him, or that any services were rendered or any act or thing was done intended or calculated to influence the action of

the Postmaster General or of any official of the Postal Department

30 Wherefore, defendant prays judgment, &c.

LEHMANN & LEHMANN AND
W. K. HAYNES,
*Attorneys for Defendant.*

And afterwards, to-wit: on the 15th day of November, 1905 the following further proceedings were had and appear of record in said cause, as follows, to-wit:—

Before His Honor, Judge Van Devanter.

5247.

THE UNITED STATES, Plaintiff,
*vs.*
JOSEPH RALPH BURTON, Defendant.

This day comes the United States by District Attorney and the said defendant being present in Court in compliance with the recognizance heretofore entered into by him and also appearing by Messrs. Haynes and Lehmann his attorneys, the said District Attorney states that he will not further prosecute the said defendant upon the fourth and fifth counts of the indictment herein against him, and asks that the said indictment as to said fourth and fifth counts be now dismissed;

It is therefore now considered by the Court that the indictment in this case so far as the same relates to the fourth and fifth counts therein contained be and the same is hereby now dismissed, and that the said defendant Joseph Ralph Burton be and he is released and discharged from further prosecution of and upon the said fourth and fifth counts of the said indictment and that as to the said counts he go hence without day etc.

The Court having fully considered the questions of law arising upon the demurrer to the first, second, third, sixth, seventh
31 and eighth counts of the indictment, which said demurrer has heretofore been argued and submitted to the Court, and being fully advised of and concerning the same, is of opinion that the law on said demurrer is for the said plaintiff, and in accordance with such opinion Now Orders that the said demurrer be, and the same is hereby now overruled, to which ruling Defendant now and here excepts.

And thereupon by leave of Court the said defendant by his attorneys, files herein his plea in bar as to the third and seventh counts of the indictment herein.

Which said Plea in Bar is in words and figures as follows, to-wit:—

(*Plea in Bar.*)

In the Circuit Court of the United States in and for the Eastern Division of the Eastern District of Missouri.

THE UNITED STATES
*vs.*
JOSEPH RALPH BURTON.

Plea in Bar to the Third and Seventh Counts of the Indictment Herein.

And the said Joseph Ralph Burton in his own proper person comes into court here and having heard the said indictment read, says that as to the third, and seventh counts of said indictment, the said United States ought not to further prosecute the said counts, or either of said counts against him, because he says that heretofore in the District Court of the said United States within and for the Eastern Division of the Eastern Judicial District of Missouri at the November Term, 1903, of said Court, the grand jurors of the United States at the November term, 1903 of said Court on their oaths did present
32 that the said Joseph Ralph Burton was at all of the times and dates in said presentation thereinafter mentioned and then was a member of the Congress of the United States of America, to-wit: a Senator from the State of Kansas duly elected and chosen by the Legislature of the State of Kansas for a term of six (6) years, expiring on the 4th day of March, A. D. 1907, and was at all of the said times duly qualified, admitted and acting as such Senator and the said grand jurors aforesaid then and there on their oaths aforesaid in and by the third count of said indictment and presentation then and there by the said grand jury found, presented and returned, did present that Joseph Ralph Burton on the 26th day of March, A. D. 1903, in the City of St. Louis, in the State of Missouri, and within the division and district aforesaid and within the jurisdiction of the Court aforesaid did unlawfully, knowingly, wilfully and corruptly take, accept and receive from one W. D. Mahaney an officer and employe of he Rialto Grain and Securities Company (a corporation) the sum of five hundred dollars, lawful money of the United States, of the value of five hundred dollars (the particular kinds and denominations of which were to the Grand Jurors aforesaid unknown) as compensation for the services of him, the said Joseph Ralph Burton, Senator as aforesaid, theretofore to-wit: on the 22nd day of November, A. D. 1902, and on divers other days between said last mentioned date and the said 26th day of March, A. D. 1903, rendered by him, the said Joseph Ralph Burton, Senator as aforesaid, to the Rialto Grain and Securities Company (a corporation as aforesaid) before the Post Office Department of the United States, in a certain matter then and there pending before
33 said Post Office Department, in which the said United States was directly interested, that is to say: whether the said Rialto Grain and Securities Company had violated the pro-

visions of Section 6480 of the Revised Statutes of the United States, in that, it (said Company) had through its officers, agents and servants devised a scheme and artifice to defraud, which was to be effected by said Rialto Grain and Securities Company, through and by its officers, agents and servants, in opening correspondence and communication with divers persons, resident within the United States, by means of the Post Office establishment of the United States, and whether said Rialto Grain and Securities Company, by its officers, agents and servants, in and for executing said scheme and artifice to defraud, had placed or deposited any letter or packet in any post office of the United States, to the end and for the purpose of enabling the Postmaster General of the United States, in pursuance of the authority vested in him by law, to ascertain, find and determine from evidence satisfactory to him, the said Postmaster General, whether he should order and direct the Postmaster at St. Louis, Missouri, not to deliver to the said Rialto Grain and Securities Company, but to return with the word "Fraudulent" plainly written or stamped upon the outside (as authorized by Section 3929 and Section 4041 of the Revised Statu-es of the United States, as amended by the Act of Congress of March 2nd, 1905) any and all letters addressed to said Rialto Grain and Securities Company, and sent to or through the Post Office at St. Louis, Missouri, by means of the Post Office establishment of the United States.

And the Grand Jurors aforesaid, on their oaths aforesaid, did further present: that the services so as aforesaid rendered to the said Rialto Grain and Securities Company, by the said Joseph Ralph Burton, Senator, as aforesaid, consisted in part of visits to the said Postmaster General, the Chief Post Office Inspector, and
34 other officers of the Post Office Department of the United States, and of representations and statements made to the said Postmaster General, the said Chief Post Office Inspector, and said other officers, which said visits, representations and statements so as aforesaid made by the said Joseph Ralph Burton, were made with a view and for the purpose of inducing said Postmaster General, the said Chief Post Office Inspector, and said other officers, to decide the question so as aforesaid pending before said Post Office Department, in a manner favorably to the said Rialto Grain and Securities Company, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States. To which last mentioned count of said last mentioned indictment the said Joseph Ralph Burton pleaded not guilty and the said United States joined issue on said plea and the said jury thereupon duly summoned, empanelled and sworn to try said issue upon their oath did say that the said Joseph Ralph Burton was not guilty as charged in said count three of the offense- in said last mentioned count in said last mentioned indictment laid to his charge. By force whereof, he, the said Joseph Ralph Burton, was of the offense charged in said third count of said last mentioned indictment acquitted and discharged as by the record thereof more fully and at large appears, and which said acquittal and discharge

remains in full force and effect and not in the least reversed or made void.

And the said Joseph Ralph Burton avers that he and the Joseph Ralph Burton, who was the defendant in the said third count of the indictment recited in this plea and acquitted as aforesaid, are one and the same person and not divers and different persons, and that the offense in the said third count of said last mentioned indictment set out and the offenses charged in the third, and seventh
35 counts of the indictment to which this plea is pleaded and in each of said third and seventh counts are one and the same offense and not divers and different offenses and that they are identical in law and identical in fact.

And that the part of the offense charged in said third count of said former indictment herein recited, wherein it is charged that the said Joseph Ralph Burton, Senator as aforesaid, did receive Five Hundred Dollars "from one W. D. Mahaney, an officer and employe of the Rialto Grain and Securities Company.....as compensation for the services.....rendered by him, the said Joseph Ralph Burton, Senator, as aforesaid, to the Rialto Grain and Securities Company" is identical in law and in fact with the charge of that part of the offense set forth in the third and seventh counts of the indictment to which this plea is pleaded, wherein in said third count it is charged that the defendant "did ..... in the eastern division of the said eastern district of Missouri receive directly from the said corporation" (The Rialto Grain and Securities Company) "certain compensation for the same services, that is to say, five hundred dollars." And wherein in said seventh count it is charged that defendant "did .....in the eastern division of the said district of Missouri receive directly from the said corporation" (the Rialto Grain and Securities Company) "through its officers, agents and attorneys certain compensation for the same services, that is to say, five hundrd dollars," and that the said sum of five hundred dollars in each and all of the counts above mentioned is the same sum of five hundred dollars and not any other or different sum of five hundred dollars.

And that the receipt of money from one W. D. Mahaney, an officer and employe of the Rialto Grain and Securities Company in said third count of said former indictment referred to is the identical fact and means stated intended to be stated in the allega-
36 tion in said third and seventh counts of the indictment to which this plea is pleaded and in each of them that the defendant did receive directly from said corporation certain compensation, and is not another and different fact and means, and that the services mentioned in the said third count of said indictment of which this defendant stands acquitted as aforesaid are the identical services mentioned in the said third and seventh counts of the indictment to which this plea is pleaded, and not other and different services and that the proceeding in the third, fifth and seventh counts of the indictment to which this plea is pleaded is one and the same proceeding and not different proceedings, and that said proceeding is the identical proceeding referred to in said third count of said indictment whereof as aforesaid defendant stands acquitted, as

a matter" then and there pending before said Post Office Department and not another and different proceeding.

All of which the said Joseph Ralph Burton is ready to verify, wherefor- he prays judgment and that by the Court here he may be dismissed and discharged from the premises and in the third, fifth and seventh counts in the present indictment specified and contained.

JOSEPH RALPH BURTON,
By LEHMANN & LEHMANN AND
W. K. HAYNES, *His Attorneys.*

STATE OF MISSOURI, *City of St. Louis, ss:*

Joseph Ralph Burton, being first duly sworn upon his oath, deposes and says: that he is the defendant in the above en-
37 titled cause; that he has read the foregoing plea in bar and that the matters and things therein contained are true.

JOSEPH RALPH BURTON.

Subscribed and sworn to by Joseph Ralph Burton before me this 14th day of November, 1905.

[SEAL.]

SEARS LEHMANN,
*Notary Public, City of St. Louis, Mo.*

My commission expires September 6th 1909.

And afterwards, to-wit: on the 16th day of November, A. D. 1905, the following further proceedings took place and appear of record in said cause, as follows, to-wit:

Before His Honor, Judge Van Devanter.

5247.

THE UNITED STATES, Plaintiff,
*vs.*
JOSEPH RALPH BURTON, Defendant.

This day comes the United States by District Attorney and the said defendant being present in court in compliance with the recognizance heretofore entered into by him and also appearing by Messrs. Haynes and Lehmann, his said attorneys, the said plaintiff files herein its replication (the same being denominated—answer) to the plea in bar heretofore filed herein, and the defendant files a motion to strike said replication from the files, whereupon said motion being taken up, the same is argued by counsel and submitted to the court; thereupon at the conclusion of such argument, upon motion of plaintiff the District Attorney by leave of Court withdraws the said replication of plaintiff herein for the purpose of replacing same with an amended pleading.

38 And afterwards, to-wit: on the 17th day of November, A. D. 1905, the following further proceedings were had and appear of record in said cause, as follows, to-wit:

Before His Honor Judge Van Devanter.

5247.

UNITED STATES, Plaintiff,
*vs.*
JOSEPH RALPH BURTON, Defendant.

Now comes the United States by the District Attorney and by leave of Court files its amended answer herein to the plea in bar of the defendant.

Which said Amended Answer to said Plea in Bar is in words and figures as follows, to-wit:

(*Amended Answer to Plea in Bar.*)

In the Circuit Court of the United States, Eastern Division of the Eastern Judicial District of Missouri, September Term, 1905.

UNITED STATES
*vs.*
JOSEPH RALPH BURTON.

Now comes the United States by David P. Dyer, United States Attorney for the Eastern District of Missouri, and by leave of court first had and obtained, makes and files this its amended answer to the plea in bar heretofore filed by defendant herein, and says: that the United States ought not to be precluded from prosecuting the said indictment against the said Joseph Ralph Burton, because:

That in counts one and two of the original indictment against the said defendant, Joseph Ralph Burton, the said defendant was charged with accepting five hundred dollars ($500.00) from the Rialto Grain & Securities Campany, a corporation, for services performed for said company by said defendant, whereas in

39 count three of said original indictment, partially set out in said plea in bar, said defendant was charged with accepting five hundred dollars ($500.00) from one W. D. Mahaney, an officer and employe of said Rialto Grain & Securities Company, for the same services mentioned in said counts one and two.

That said defendant, Joseph Ralph Burton was duly convicted by the jury as charged in said counts one and two of said original indictment, and judgment pronounced upon said verdict.

That said defendant prosecuted an appeal from said verdict and judgment of the Supreme Court of the United States, wherein a new trial was in effect granted the said defendant.

That said counts three, one and two of said original indictment are in form and words as follows:

"Third Count: And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: that Joseph Ralph Burton was at all of the times and dates hereinafter mentioned, and now is a member of the Congress of the United States of America, to-wit: a Senator from the State of Kansas, duly elected and chosen by the Legislature of said State of Kansas for a term of six years, expiring on the 4th. day of March, A. D., 1907, and was at all of said times duly qualified, admitted and acting as such Senator.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: that on the 26th day of March, A. D. 1903, at the City of St. Louis, in the State of Missouri, and within the Division and District aforesaid, and within the jurisdiction of the court aforesaid, the said Joseph Ralph Burton, Senator as aforesaid, did unlawfully, knowingly, willfully and corruptly take, accept and receive from one W. D. Mahaney, an officer and employe of the
40 Rialto Grain & Securities Company, (a corporation) the sum of five hundred dollars, lawful money of the United States, of the value of five hundred dollars, (the particular kinds and denominations of which are to the Grand Jurors aforesaid unknown) as compensation for the services of him, the said Joseph Ralph Burton, Senator as aforesaid, theretofore, to-wit: on the 22nd day of November, A. D., 1902, and on divers other days between said last mentioned date and the said 26th day of March, A. D., 1903, rendered by him, the said Joseph Ralph Burton, Senator as aforesaid, to the Rialto Grain & Securities Company, (a corporation as aforesaid) before the Post Office Department of the United States, in a certain matter then and there pending before said Post Office Department, in which the said United States was directly interested, that is to say: whether the said Rialto Grain & Securities Company had violated the provisions of Section 5480 of the Revised Statutes of the United States, in that it, (said Company) had through its officers, agents and servants devised a scheme and artifice to defraud, which was to be effected by said Rialto Grain & Securities Company, through and by its officers, agents and servants, in opening correspondence and communication with divers persons, resident within the United States, by means of the Post Office Establishment of the United States, and whether said Rialto Grain & Securities Company, by its officers, agents and servants, in and for executing said scheme and artifice to defraud, had placed or deposited any letter or packet in any post office of the United States, to the end and for the purpose of enabling the Postmaster General of the United States in pursuance of the authority vested in him by law, to ascertain, find and determine from evidence satisfactory to him, the said Postmaster General, whether he should order and direct the Postmaster at St. Louis, Missouri, not to deliver to the said Rialto Grain & Securities
41 Company, but to return with the word "Fraudulent" plainly written or stamped upon the outside (as authorized by Section 3929 and Section 4041 of the Revised Statutes of the United States, as amended by the Act of Congress of March 2nd, 1895) any

and all letters addressed to said Rialto Grain & Securities Company, and sent to or *though* the Post Office at St. Louis, Missouri, by means of the Post Office establishment of the United States.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: that the services so as aforesaid rendered to the said Rialto Grain & Securities Company, by the said Joseph Ralph Burton, Senator as aforesaid, consisted in part of visits to the said Postmaster General, the Chief Post Office Inspector, and other officers of the Post Office Department of the United States, and of representations and statements made to the said Postmaster General, the said Chief Post Office Inspector, and said other officers, which said visits, representations and statements so as aforesaid made by the said Joseph Ralph Burton, were made with a view and for the purpose of inducing said Postmaster General, the said Chief Post Office Inspector, and said other officers, to decide the question pending before said Post Office Department in a manner favorable to the said Rialto Grain & Securities Company, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States."

And further that the first and second counts in the original indictment, referred to in said plea in bar, were identical in law with the said third and seventh counts of the indictment herein, as will appear from an examination of said 1st and 2nd counts of said original indictment, which are in form and words as follows:

42 "1st. Count: The Grand Jurors of the United States, empaneled, sworn and charged at the Term aforesaid, of the court aforesaid, on their oaths present: that Joseph Ralph Burton was at all of the times and dates hereinafter mentioned, and now is a member of the Congress of the United States of America, to-wit: a Senator from the State of Kansas, duly elected and chosen by the Legislature of said State of Kansas, for term of six years, expiring on the 4th. day of March, A. D., 1907, and was at all of the said times duly qualified, admitted and acting as such Senator.

And the Grand Jurors, aforesaid, on their oaths aforesaid, do further present: that on the 26th. day of March, A. D., 1903, at the City of St. Louis, in the State of Missouri, and within the Division and District aforesaid and within the jurisdiction of the court aforesaid, the said Joseph Ralph Burton, Senator as aforesaid, did unlawfully, knowingly, willfully and corruptly take, accept and receive from the Rialto Grain & Securities Company (a corporation duly organized under the laws of the State of Missouri) the sum of five hundred dollars, lawful money of the United States, of the value of five hundred dollars, (the particular kinds and denominations of which are to the Grand Jurors aforesaid unknown,) as compensation for the services of him, the said Joseph Ralph Burton, Senator as aforesaid, theretofore, to-wit: on the 22nd. day of November, A. D. 1902, and on divers other days between said last mentioned date and the said 26th. day of March, A. D. 1903, rendered by him, the said Joseph Ralph Burton, Senator as aforesaid, to the said Rialto Grain & Securities Company, before the Post Office Department of the United States, in a certain matter than and there pending before

said Post Office Department, in which the said United States was directly interested, that is to say: whether the said Rialto Grain &
Securities Company had violated the provisions of Section
43 5480 of the Revised Statutes of the United States, in that it
(said company) had through its officers, agents and servants devised a scheme and artifice to defraud, which was to be effected by said Rialto Grain & Securities Company, through and by its officers, agents and servants, in opening correspondence and communication with divers persons resident within the United States, by means of the Post Office Establishment of the United States, and whether the said Rialto Grain & Securities Company, by its officers, agents and servants, in and for executing said scheme and artifice to defraud, had placed or deposited any letter or packet in any post office of the United States, to the end and for the purpose of enabling the Postmaster General of the United States, in pursuance of the authority vested in him by law, to ascertain, find and determine from evidence satisfactory to him, the said Postmaster General, whether he, should order and direct the Postmaster at St. Louis, Missouri, not to deliver to the said Rialto Grain & Securities Company, but to return with the word "Fraudulent" plainly written or stamped upon the outside (as authorized by Section 3929 and Section 4041 of the Revised Statutes of the United States, as amended by the Act of Congress of March 2, 1895) any and all letters addressed to said Rialto Grain & Securities Company, and sent to or through the Post Office at St. Louis, Missouri, by means of the Post Office Establishment of the United States.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: that the services so as aforesaid rendered to the said Rialto Grain & Securities Company by the said Joseph Ralph Burton, Senator as aforesaid, consisted in part of visits to the said Post-
master General, the Chief Post Office Inspector, and other
44 officers of the Post Office Department of the United States,
and of representations and statements made to the said Postmaster General, the said Chief Post Office Inspector and said other officers, which said visits, representations and statements, so as aforesaid made by the said Joseph Ralph Burton, were made with a view and for the purpose of inducing said Postmaster General, the said Chief Post Office Inspector, and said other officers, to decide the question so as aforesaid pending before said Post Office Department in a manner favorable to the said Rialto Grain and Securities Company, contrary to the form of the statutes in such case made and provided and against the peace and dignity of the United States."

"Second Count: And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: that Joseph Ralph Burton was at all of the times and dates hereinafter mentioned, and now is a member of the Congress of the United States of America, to-wit: a Senator from the State of Kansas, duly elected and chosen by the Legislature of said State of Kansas for a term of six years, expiring on the 4th day of March, A. D. 1907, and was at all of said times duly qualified, admitted and acting as such Senator.

And the Grand Jurors aforesaid, on their oaths aforesaid, do fur-

ther present: that on the 26th. day of March, A. D. 1903, at the City of St. Louis, in the State of Missouri, and within the Division and District aforesaid, and within the jurisdiction of the court aforesaid, the said Joseph Ralph Burton, Senator as aforesaid, did unlawfully, knowingly, willfully and corruptly take, accept and receive from the Rialto Grain & Securities Company (a corporation duly organized under the laws of the State of Missouri), the sum of five hundred dollars (the particular kinds and denominations of which are to the Grand Jurors aforesaid unknown) as compensation for the services of him, the said Joseph Ralph Burton, Senator as afore-
45 said, theretofore, to-wit: on the 22nd day of November, A. D. 1902, and on divers other days between said last mentioned date and the 26th. day of March, A. D. 1903, rendered by him, the said Joseph Ralph Burton, Senator as aforesaid, to the said Rialto Grain & Securities Company, before the Post Office Department of the United States, in a certain matter then and there pending before said Post Office Department, in which the said United States was indirectly interested, that is to say: whether the said Rialto Grain & Securities Company had violated the provisions of Section 5480 of the Revised Statutes of the United States, in that it (said company) had through its officers, agents and servants, devised a scheme and artifice to defraud, which was to be effected by said Rialto Grain & Securities Company, through and by its officers, agents and servants, in opening correspondence and communication with divers persons, resident within the United States, and whether said Rialto Grain & Securities Company, by its said officers, agents and servants, in and for executing said scheme and artifice to defraud, had placed or deposited any letter or packet in any post office of the United States, to the end and for the purpose of enabling the Postmaster General of the United States, in pursuance of the authority vested in him by law, to ascertain, find and determine from evidence satisfactory to him, the said Postmaster General, whether he should order and direct the said Postmaster at St. Louis, Missouri, not to deliver to the said Rialto Grain & Securities Company, but to return with the word "Fraudulent" plainly written or stamped upon the outside (as authorized by Section 3929 and Section 4041 of the Revised Statutes of the United States, as amended by the Act of Congress of March 2, 1895) any and all letters addressed to said Rialto Grain & Securities Company, and sent to or through the post
46 office at St. Louis, Missouri, by means of the post office establishment of the United States.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: that the services so as aforesaid rendered to the said Rialto Grain & Securities Company, by the said Joseph Ralph Burton, Senator as aforesaid, consisted in part of visits to the said Postmaster General, the Chief Post Office Inspector, and other officers of the post office department of the United States, and of representations and statements made to the said Postmaster General, the said Chief Post Office Inspector, and said other officers, which said visits, representations and statements so as aforesaid made by the said Joseph Ralph Burton, were made with a view and for the purpose of

inducing said Postmaster General, the Chief Post Office Inspector, and said other officers, to decide the question so as aforesaid pending before said Post Office Department, in a manner favorable to the said Rialto Grain & Securities Company contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States."

And the United States further answering says that the offense charged against said defendant, Joseph Ralph Burton, in said counts three and seven of the indictment herein, is identical in legal effect with the offense charged in said counts one and two of said original indictment, but that the offense charged against the defendant in said counts three and seven of the indictment herein is not identical in legal effect with said count three of said original indictment, as will appear from an examination of said counts.

All of this the United States is ready to verify.

47 Wherefore, the said United States prays judgment, and that the said defendant, Joseph Ralph Burton, may be convicted of the premises in the said indictment herein.

DAVID P. DYER,
*United States Att'y.*

And afterwards, to-wit: on the 18th day of November, A. D. 1905, the following further proceedings were had and appear of record in said cause as follows, to-wit:—

Before His Honor Judge Van Devanter.

5247.

THE UNITED STATES, Plaintiff,
*v.*
JOSEPH RALPH BURTON, Defendant.

This day come again the parties herein by their respective attorneys, and the defendant files a demurrer to the amended answer to the plea in bar heretofore filed herein, which said Demurrer being taken up is argued by counsel and submitted to the Court, it being in that connection agreed by and between the parties that the question arising upon the said plea and amended answer is one of law to be determined by the Court:

And the Court having fully considered the question arising upon said demurrer is of opinion that the law is for the plaintiff and in accordance with such opinion, Now Orders that the said demurrer be and the same is hereby overruled, to which ruling of the Court, the defendant by counsel now and here duly excepts: whereupon the said defendant by counsel declining to plead further, the Court doth find that the said plea in bar is not well taken, and doth order that the same be and it is hereby overruled and denied.

48 Thereupon, the said defendant is duly arraigned upon the indictment herein against him and pleads not guilty of the charges therein contained.

Which said Demurrer to the Amended Answer to the Plea in Bar is in words and figures as follows, to-wit:—

*(Demurrer to Amended Answer to Plea in Bar.)*

In the Circuit Court of the United States, Eastern Division, Eastern Judicial District of Missouri.

UNITED STATES
*vs.*
JOSEPH RALPH BURTON.

Demurrer.

Comes now Joseph Ralph Burton the defendant herein, by F. W. Lehmann and W. Knox Haynes his attorneys, and demurs to the replication of the plaintiff to defendants plea in bar, because he says that the same is insufficient in law to preclude him from his said plea.

Wherefore, he prays judgment, etc.

F. W. LEHMANN,
W. KNOX HAYNES,
*Attorneys for Defendant.*

And afterwards, to-wit: on the 20th day of November, A. D. 1905, the following further proceedings were had and appear of record in said cause, as follows, to-wit:—

Before His Honor Judge Van Devanter.

5247.

THE UNITED STATES, Plaintiff,
*vs.*
JOSEPH RALPH BURTON, Defendant.

49 Comes now the United States by its District Attorney, Mr. David P. Dyer, and by its Assistant Attorney General, Mr. Charles H. Robb, and comes also the defendant in his own proper person and accompanied by his counsel, Mr. Fred W. Lehmann and Mr. W. Knox Haynes, and the said parties now announcing themselves as ready for trial, a jury composed of Thomas Marr, Charles Noel, J. Otto Brandt, John Schatz, J. C. McLachlin, N. O. Vegely, Julius Garesche, Arthur Thacher, Robert B. Nicholson, G. W. Sanders, H. S. Wells, L. H. Baker, twelve good and lawful men heretofore duly and regularly drawn and summoned, are now duly and regularly examined, empanelled and sworn, as required by law, to try and true deliverance make between the United States and the said defendant upon the indictment herein and a true verdict render

according to the law and the evidence. Thereupon the opening statements of counsel to the jury are made and the introduction of evidence on behalf of the Government is begun and proceeded with until the hour of adjournment; and the jury being first duly cautioned and admonished respecting their conduct during the adjournment of the court, the further hearing of this cause is now continued until the opening of court tomorrow morning, and it is ordered that the Marshal of the United States in and for the Eastern District of Missouri furnish the jury sworn in this case with board and lodging during the trial of the same at the cost of the United States, and that he do not permit said jury to separate.

And afterwards, to-wit: on the 21st day of November, A. D. 1905, the following further proceedings were had and appear of record in said cause as follows, to-wit:—

50 Before His Honor Judge Van Devanter.

5247.

THE UNITED STATES, Plaintiff,
*vs.*
JOSEPH RALPH BURTON, Defendant.

Comes now the United States by its District Attorney, Mr. David P. Dyer, and by its Assistant Attorney General, Mr. Charles H. Robb, and comes also the defendant in his own proper person and accompanied by his counsel, Mr. Fred W. Lehmann and Mr. W. Knox Haynes, and comes also the jury heretofore empanelled and sworn herein, and the further introduction of evidence on behalf of the Government is proceeded with until the hour of adjournment, when the jury retire in the custody of the Marshal, and the further hearing of this cause is continued until the opening of Court tomorrow morning.

And afterwards, to-wit: on the 22nd day of November, A. D. 1905, the following further proceedings were had and appear of record in said cause as follows, to-wit:—

Before His Honor Judge Van Devanter.

5247.

THE UNITED STATES, Plaintiff,
*vs.*
JOSEPH RALPH BURTON, Defendant.

Comes now the United States by its District Attorney, Mr. David P. Dyer, and by its Assistant Attorney General, Mr. Charles H. Robb, and comes also the defendant in his own proper person and accom-

panied by his counsel, Mr. Fred W. Lehmann and Mr. W. Knox Haynes, and comes also the jury heretofore empanelled and sworn herein, and thereupon the further introduction of evidence on behalf of the Government is proceeded with until the hour of adjournment when the jury retire in the custody of the Marshal and the further hearing of this cause is continued until the opening of Court tomorrow morning.

51 And afterwards, to-wit: on the 23rd day of November, A. D. 1905, the following further proceedings were had and appear of record in said cause, as follows, to-wit:

Before His Honor Judge Van Devanter.

5247.

THE UNITED STATES, Plaintiff,
*vs.*
JOSEPH RALPH BURTON, Defendant.

Comes now the United States by its District Attorney Mr. David P. Dyer, and by his Assistant Attorney General, Mr. Charles A. Robb, and comes also the defendant in his own proper person and accompanied by his counsel, Mr. Frederick W. Lehmann and W. Knox Haynes, and comes also the jury heretofore empanelled and sworn herein, and thereupon the introduction of evidence on behalf of the Government is proceeded with and concluded and the introduction of evidence on behalf of the defendant is begun and proceeded with until the hour of adjournment, when the jury retire in the custody of the Marshal and the further hearing of this cause is continued until the opening of Court tomorrow morning. Opinion filed.

And afterwards, to-wit: on the 24th day of November, A. D. 1905, the following further proceedings were had and appear of record in said cause, as follows, to-wit:—

Before His Honor Judge Van Devanter.

5247.

THE UNITED STATES, Plaintiff,
*vs.*
JOSEPH RALPH BURTON, Defendant.

Comes now the United States by its District Attorney, Mr. David P. Dyer, and by its Assistant Attorney General, Mr. Charles H. Robb, and comes also the defendant in his own proper person and accompanied by his counsel, Mr. Frederick W. Lehmann, and Mr. W. Knox Haynes, and comes also the jury heretofore empanelled and sworn herein, and the introduction of evidence on behalf of the

defendant is proceeded with and concluded, and the introduc-
52 tion of evidence in rebuttal on behalf of the Government is begun and concluded; and thereupon the opening address to the jury on behalf of the Government is made by Mr. Charles H. Robb, Assistant Attorney General of the United States, at the conclusion of which, it being now the hour of adjournment, the jury retire in the custody of the Marshal and the further hearing of this cause is continued until the opening of Court tomorrow morning.

And afterwards, to-wit: on the 25th day of November, A. D. 1905, the following further proceedings were had and appear of record in said cause, as follows, to-wit:—

Before His Honor Judge Van Devanter.

5247.

THE UNITED STATES, Plaintiff,
*vs.*
JOSEPH RALPH BURTON, Defendant.

Comes now the United States by its District Attorney, Mr. David P. Dyer, and by its Assistant Attorney General, Mr. Charles H. Robb, and comes also the defendant in his own proper person and accompanied by his counsel, Mr. Frederick W. Lehmann and Mr. W. Knox Haynes, and comes also the jury heretofore empanelled and sworn herein, and the opening and closing addresses to the jury on behalf of the defendant are made by Mr. W. Knox Haynes and Mr. Frederick W. Lehmann respectively, counsel for defendant, and the closing address to the jury on behalf of the Government is made by Mr. David P. Dyer, its District Attorney, and the jury after being duly charged and instructed by the Court retires to consider of its verdict, and afterwards returns into court the following verdict, to-wit:

53 "No. 5247.

"THE UNITED STATES, Plaintiff,
"*vs.*
"JOSEPH RALPH BURTON, Defendant.

"We the jury in the above entitled cause find as follows:

"Upon the first count of the Indictment herein we find the defendant guilty.

"Upon the second count of the Indictment herein we find the defendant guilty.

"Upon the third count of the Indictment herein we find the defendant guilty.

"Upon the sixth count of the Indictment herein we find the defendant guilty.

"Upon the seventh count of the Indictment herein we find the defendant guilty.

"Upon the eighth count of the Indictment herein we find the defendant guilty.

"H. S. WELLS, *Foreman.*"

And thereupon, it is ordered that the said defendant continue under his existing recognizance and appear at and before this Court on Monday, the 27th day of November, 1905, at ten o'clock in the morning when such further proceedings will be taken as may be proper or necessary.

And afterwards, to-wit: on the 27th day of November, A. D. 1905, the following further proceedings were had and appear of record in said cause, as follows, to-wit:—

54 Before His Honor Judge Van Devanter.

5247

THE UNITED STATES, Plaintiff,
*vs.*
JOSEPH RALPH BURTON, Defendant.

Comes now the United States by its District Attorney, Mr. David P. Dyer, and comes the defendant in his own proper person and accompanied by his counsel, Mr. Frederick W. Lehmann and Mr. W. Knox Haynes, and files a motion for new trial herein, and thereupon it is ordered that the defendant appear at and before this Court on Wednesday, the 29th day of November, 1905, at ten o'clock in the morning, when such further proceedings will be taken as may be proper or necessary.

And afterwards, to-wit; on the 29th day of November, A. D. 1905, the following further proceedings were had and appear of record as follows, to-wit:

Before His Honor Judge Van Devanter.

5247.

THE UNITED STATES, Plaintiff,
*vs.*
JOSEPH RALPH BURTON, Defendant.

Comes now the United States by its District Attorney, Mr. David P. Dyer, and comes also the defendant in his own proper person and accompanied by his counsel, Mr. Frederick W. Lehmann and Mr. W. Knox Haynes, and thereupon the defendant presents unto the Court his motion for a new trial, and the same being argued by counsel and the Court being duly advised in the premises it is ordered that such motion be and the same is hereby overruled; to which ruling the defendant now and here excepts:

55 And thereupon the defendant presents unto the Court his motion in arrest of judgment herein, and the same being argued by counsel and the Court being fully advised in the premises, it is ordered that said motion be, and the same is hereby overruled, to which ruling the defendant now and here excepts:

And thereupon inquiry is made of the defendant whether he has aught to say why judgment and sentence should not be pronounced

against him upon the verdict of the jury heretofore returned herein, and no sufficient reason to the contrary being presented, it is now considered, ordered and adjudged by the Court in pursuance of the verdict of the jury rendered upon the sixth count of the indictment herein that the defendant is guilty of a violation of Section 1782 of the Revised Statutes of the United States in having, during his continuance in the office of Senator in Congress, agreed with the Rialto Grain and Securities Company to receive compensation for services to be rendered to such Company by him in relation to a proceeding, matter and thing in which the United States was indirectly interested before the Post Office Department, as charged in said count; and it is further considered, ordered and adjudged by the Court that as a punishment for such offense the defendant be imprisoned for the period of six months in the county jail at Ironton, in the County of Iron, and the State of Missouri; that he be fined in the sum of Two Thousand Dollars ($2,000) and that, by his conviction of
56 such offense, he is rendered forever hereafter incapable of holding any office of honor, trust or profit under the government of the United States;

And it is now further considered, ordered and adjudged by the Court in pursuance of the verdict of the jury rendered upon the seventh count of the indictment herein that the defendant is guilty of a violation of Section 1782 of the Revised Statutes of the United States in having, during his continuance in the office of Senator in Congress, received from the Rialto Grain and Securities Company compensation for services rendered to such Company by him in relation to a proceeding, matter and thing in which the United States was indirectly interested before the Post Office Department, as charged in said count; and it is further considered, ordered and adjudged by the Court that as a punishment for the offense last named the defendant be imprisoned for the period of six months in the county jail at Ironton, in the County of Iron, and the State of Missouri, such term of imprisonment to begin and run concurrently with the term of imprisonment imposed by the judgment and sentence hereinbefore pronounced upon the sixth count of the indictment; that he be fined in the sum of Five Hundred Dollars, and that, by his conviction of the offense charged in the seventh count of the indictment, he is rendered forever hereafter incapable of holding any office of honor, trust or profit under the government of the United States;

It is further ordered, considered and adjudged by the Court that the defendant do pay the costs of the prosecution of this cause to be taxed according to law;

And the Marshal of the United States in and for this District is hereby directed to deliver the defendant together with a certified copy of the judgment and sentence pronounced herein to the jailor of the jail before named;

57 And it appearing that the first, second and eighth counts of the indictment upon which a verdict of guilty was returned by the jury embrace and cover the same transaction and offense as is embraced in the sixth count of the indictment, it is ordered that

no judgment or sentence be pronounced upon the said first, second or eighth counts of the indictment;

And it appearing that the third count of the indictment upon which a verdict of guilty was returned by the jury embraces and covers the same transaction and offense as is embraced in the seventh count of the indictment, it is ordered that no judgment or sentence be pronounced upon the said third count of the indictment;

And thereupon the defendant tenders to the Court a Bill of Exceptions herein which is now allowed, signed, sealed and ordered to be made a part of the record herein;

And thereupon the defendant presents to the Court a petition for a Writ of Error, accompanied by assignments of error, to the Supreme Court of the United States from the judgment and sentence pronounced herein, whereupon a Writ of Error is allowed and a Citation is issued as provided by law; and it is ordered that upon the defendant giving a bond in the sum of Five Thousand Dollars conditioned as required by law and with surety to be approved by the Court, a supersedeas be awarded staying the execution of the judgment and sentence pronounced herein during the pendency of such Writ of Error. Thereupon the defendant presents unto the Court a Bond in the sum of Five Thousand Dollars conditioned as required by law with Richard C. Kerens as surety therein, which Bond is now approved by the Court, and it is ordered that the Writ of Error herein, upon due service thereof, shall operate as a supersedeas as aforesaid.

58 Which said Bill of Exceptions, Petition for a Writ of Error, Assignment of Errors, and Bond are in words and figures as follows, to-wit:

59 In the United States District Court in and for the Eastern Division of the Eastern District of Missouri.

THE UNITED STATES
*vs.*
JOSEPH RALPH BURTON.

Be it remembered, That upon the trial of this cause, during the September term, 1905, of the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, upon the 20th day of November, and the days following, A. D. 1905, before Willis Van Devanter, Circuit Judge, and a jury, the following proceedings were had and evidence introduced.

The United States was represented in the trial of said cause by Mr. David P. Dyer, United States District Attorney for said District, and Mr. Charles H. Robb, Assistant Attorney General of the United States. The defendant was represented by Messrs. Fred Lehmann and W. Knox Haynes.

60 Of the venire the following were called and sworn, to be examined touching their qualifications as jurors:

Thomas Marr
William B. Jones
Charles Noel
J. Otto Brandt
John Schatz
J. C. McLachlin
N. O. Vegely
W. Goddard
Peter J. Doerr
Julius Garesche
Arthur Thacher
R. B. Nicholson
G. W. Sanders
Hugo Koehler
H. B. Krenning
E. Barklage
H. S. Wells
L. H. Baker

Counsel for the Government, after making a brief statement of the case, proceeded to examine the jury as follows:

61 WILLIAM V. JONES.

Q. Do you live in the city of St. Louis?
A. Yes sir.
Q. What is your business?
A. Dry goods commission.
Q. Where is your place of business?
A. No. 14 North Tenth Street.
Q. How long have you been in business in this city?
A. Twenty-two years.
Q. Where were you born?
A. In Ireland.
Q. How long have you lived in Missouri?
A. Twenty-three years.
Q. Are you a man of family?
A. Yes sir.
Q. Where do you live in the city?
A. At the Buckingham Hotel.
Q. You heard me state this case?
A. Yes sir.
Q. Have you formed an opinion as to the guilt or innocence of the defendant?
A. Yes sir, at the first trial.
Q. Have you that opinion still?
A. Yes sir, to some degree.
Q. Would the opinion that you have now—is that opinion of such a character as would require evidence to remove the opinion you have thus formed?
A. No sir.

Q. Could you go into the jury box regardless of what opinion you have heretofore entertained, hear the evidence in this case, and the instructions of the Court, and render a verdict in accordance with the evidence and the law as declared by the Court?

A. Yes sir.

62 HUGO KOEHLER.

Q. Where do you live?

A. 5346 Maple Avenue, St. Louis.

Q. How long have you lived in St. Louis?

A. Fifteen years consecutively.

Q. Where did you live before that?

A. In Davenport, Iowa.

Q. You were raised in Iowa?

A. Yes sir.

Q. What is your business?

A. The brewing business.

Q. What brewery are you connected with?

A. The American Brewing Company.

Q. What position do you hold?

A. Vice president.

Q. Who is the president?

A. My brother, H. Koehler, Jr.

Q. Do you know the defendant, Joseph Ralph Burton?

A. Yes sir.

63 Q. How long have you known him?

A. About three years.

Q. Where did you become acquainted with him?

A. At the Germania Trust Company's office and elsewhere.

Q. And elsewhere?

A. I met the Senator on several occasions after that, in a social manner.

Q. Have you ever had any business with him?

A. No sir.

Q. Have you formed or expressed an opinion as to his guilt or innocence?

A. I have expressed an opinion at times.

Q. You need not state what the opinion was. But have you expressed an opinion?

A. I have expressed an opinion at times.

Q. Have you that opinion now?

A. I have not given the matter much thought recently.

Q. How often did you express that opinion?

A. Perhaps once or twice.

Q. To whom did you express it, to him?

A. No sir, I never discussed the matter with him.

The COURT: What does counsel for the government say to the jury? Do you pass for cause?

Mr. DYER: I submit that two of these jurors are disqualified by their answers. Hugo Koehler and H. B. Krenning.

The COURT: Does the defendant acquiesce in this challenge for cause, or desire to cross-examine the jurors?

Mr. LEHMANN: I desire to examine the jurors.

The COURT: You may examine the entire number, and particularly these two in reference to the challenge presented by the government.

64 Counsel for defendant then proceeded to examine the jury as follows:

WILLIAM V. JONES.

Q. I believe you stated you had an opinion as a result of the other trial?

A. Yes sir.

Q. Was that opinion predicated on the evidence as presented in the newspapers from time to time?

A. Yes sir.

Q. And upon substantially the same showing you would have, naturally, the same opinion?

A. I would be guided by the evidence.

Q. And upon a similar showing, you would have, naturally, the same opinion?

A. Yes sir.

Q. You were here in the city throughout the period of that trial?

A. Yes sir.

Q. And your opinion was predicated upon reports of the testimony?

A. Yes sir.

Q. Do you recall what that opinion was—I do not ask you what it was,—but the nature of that opinion is still in your mind?

A. Yes sir.

Q. And necessarily would attend you in the jury box? That is to say you could not put the opinion out of your mind?

A. No sir, I couldn't do that.

Q. I do not suppose any one could do that. And it would have the same influence that any other opinion you possess would have?

A. Yes sir.

65 Mr. LEHMANN: The challenge of Mr. Koehler I do not believe to be well taken.

The COURT: What do you say as to the other jurors presented?

Mr. LEHMANN: I think Mr. Jones has disqualified himself by his answers.

The COURT: Is that all?

Mr. LEHMANN: That is all.

The COURT: What does the government say as to the challenge of Mr. Jones.

Mr. DYER: As to Mr. Jones, his statement is clear and positive that whatever opinion he had would not be affected by this. He said he had read some of the testimony, but that does not disqualify him.

The Court then examined Mr. HUGO KOEHLER, as follows:

Q. Do you know the defendant personally?
A. Yes sir, I have met him on several occasions.
Q. How long have you known him?
A. About three years.
Q. Have you had any business transactions with him?
A. Never.
Q. Have you had any particular social intercourse with him?
A. No sir. They were very casual meetings.
Q. Have you had any connections, in any way, with the company named in this indictment, the Rialto Grain & Securities Company?
A. No sir.
Q. Or with its officers?
A. No sir.
Q. Or with persons whom you know to be its officers?
A. No sir.
Q. Upon what is the opinion which you formed based?
A. Largely upon the evidence as reported in the newspapers.
66 Q. Did you attend the trial or any part of it, the former trial?
A. No sir.
Q. Did any one who is associated with you in business attend the trial, or act as a juror or grand juror in the case?
A. One of the attorneys with whom I am well acquainted did. Mr. Thomas B. Harlan.
Q. You have had some conversation with him about the case?
A. Yes sir.
Q. And the fact of having a conversation with him with respect to the case, has it, or has it not, tended to give you an opinion, a little more strongly than would have obtained from the mere reading of the newspapers?
A. I think so. I think it weighed in forming my judgment.
Q. Was Mr. Harlan one of the witnesses in this case?
Mr. DYER: Yes sir.
The COURT: The challenge of Mr. Koehler is sustained.
To which ruling the defendant then and there at the time by his counsel duly excepted.
The Court then examined the juror WILLIAM V. JONES, as follows:
Q. Do you know the defendant?
A. No sir.
Q. Have you ever had any correspondence or business with him in any way?
A. No sir.
Q. Upon what is the opinion which you have formed based?
A. Newspaper reports entirely.
Q. Newspaper reports entirely?
A. Yes sir.
Q. Are you conscious of having talked with or having heard any of the witnesses in the case talk about it, or describe the
67 evidence.
A. No sir.

Q. Did the reading of the newspaper reports produce in your mind the conviction that that which was there stated was true, or was the opinion which you formed one to the effect that if what was stated in the newspaper was true, then your opinion in the case would be along some particular line?

A. If the report in the newspapers was correct, I had formed a certain opinion.

Q. Have you now an opinion, or conviction, as to whether the statements in the newspapers were correct?

A. Well, I believe them to be correct.

Q. Do you understand that that is a mere newspaper report of the proceedings here?

A. Yes sir.

Q. And that in all probability it is not a perfectly accurate and complete statement of the evidence as presented at the trial?

A. That was the impression I had at the time that the statements reported in the newspapers were in the main correct. I did not pay any particular attention to read the reports afterwards.

Q. Were you taking a particular interest in the case at that time?

A. No sir.

Q. What do you say now as to whether you can enter upon the trial of this case and be governed by the evidence as it shall be delivered by the witnesses, and by the law as it shall be stated to you by the Court?

A. I believe I could give an impartial judgment in connection with it, except that I might be unconsciously influenced by what happened before, what I had read in the newspapers previously as to what took place in the other trial; but only in that respect.

68 Q. It is the law that on the trial of this case the defendant is presumed to be innocent, and that the government must now, by the evidence here to be presented, establish the guilt of the defendant beyond a reasonable doubt. It is the law that no matter of rumor or report or other unreliable and loose matter can be at all considered.

So I ask you, can you enter upon the trial of this case, and give to the defendant, in the beginning and during the trial, the presumption of innocence to which he is entitled, save as it may be overcome, if it is, by the evidence here presented?

A. Yes sir, I believe I could.

Q. And you do or do not believe that you can rest your verdict, therefore, upon the evidence here presented, when viewed in the light of the law, as it shall be given you by the Court?

A. I believe that I could give an impartial opinion, irrespective—except that I might be influenced unconsciously by the other.

Q. Are you conscious now of any opinion or inclination in the case which would tend to prevent you from rendering a verdict solely upon the evidence and the law as it shall be given you by the Court?

A. No sir.

The COURT: The challenge is over-ruled.

To which ruling the defendant then and there, at the time, by his counsel, duly excepted.

The foregoing contains the full examination of Mr. Jones and also of Mr. Koehler.

69 Mr. LEHMANN: Do you wish to limit us to three challenges?

The COURT: Do you ask for more?

Mr. LEHMANN: Yes sir.

The COURT: On what ground?

Mr. LEHMANN: On the ground that the punishment attached to this offense makes it a felony.

The COURT: Do you wish to call attention to any statute except Section 1782, which says specifically it is a misdemeanor?

Mr. LEHMANN: We wish to base it on the statute, which by reason of the punishment attached to this offense makes it a felony.

The COURT: Your request will be over-ruled.

To which ruling the defendant then and there, at the time, by his counsel, duly excepted.

The counsel for the prosecution and for the defense having made their challenges in accordance with the instructions of the Court, the Clerk then called the names of the following as the jury selected to try the case:

| | |
|---|---|
| Thomas Marr | Julius Garesche |
| Charles Noel | Arthur Thacher |
| J. Otto Brandt | Robert B. Nicholson |
| John Schatz | G. W. Sanders |
| J. C. McLachlin | H. S. Wells |
| N. O. Vegely | L. H. Baker |

And this jury was then sworn to try the case, and the trial was proceeded with as follows:

70 At the conclusion of the examination for cause eighteen jurors who had been so examined and not excused including Mr. Jones, were presented to the defendant, and the Government, and from these jurors the defendant and the Government were directed to make their peremptory challenges.

The COURT: The challenges will be made, the peremptory challenges, one by the defendant, one by the prosecution, and in that order until each shall have exercised three peremptory challanges. And the first twelve remaining after the exercise of the challenges, will be the twelve to try the case. The particular challenges must be exercised in the order indicated, or waived.

A list of the jurors will be presented to counsel, and on that list counsel will simply note their challenges, without making any public announcement of it, and the clerk will hand it to the Court.

Mr. DYER: I supose counsel on either side will have to confer as they make these challenges.

The COURT: No. The list will be presented to counsel for defendant. If they desire to make a challenge they may do so, and then the list will be presented to you, and if you desire to make a challenge you may do so. Then the list will be presented to them. When the challenges are made, or such as you elect to make, then I will

announce them, but the jurors will not know who has challenged them.

Mr. LEHMANN: The usual procedure here has been for the government to make its challenges, and then the defendant. I am not familiar with the rule as announced by your Honor.

The COURT: I have announced the rule. You may except to it, if you wish.

Mr. LEHMANN: I do.

71 Mr. LEHMANN: It is admitted that the defendant was a Senator in the Congress of the United States, from the State of Kansas, during all the times named in the indictment, and is still such, duly qualified, sworn, and exercising the functions of that office.

Counsel for the government next offers in evidence the certificate and articles of incorporation of the Rialto Grain anad Securities Company, of this city.

The COURT: They may be admitted in evidence, and counsel may now read them.

The certificate and articles of incorporation were then read and are in the words and figures following, to-wit:

STATE OF MISSOURI, DEPARTMENT OF STATE.

To All Whom These Presents Shall Come:

I, Samuel B. Cook, Secretary of State of the State of Missouri, and Keeper of the Great Seal thereof, hereby certify that the annexed pages contain a full, true, and complete copy of Articles of Association of the Rialto Grain and Securities Company, filed Sept. 5th, 1902, as the same appears on file in this office.

In Testimony Whereof, I hereunto set my hand and
[SEAL.] affix the Great Seal of the State of Missouri.

Done at the City of Jefferson, this 9th day of March, A. D., 1904.

SAMUEL B. COOK,
*Secretary of State.*

ST. LOUIS, MO., *Sept.* 2, 1902.

Know All Men By These Presents:

72 That we, whose names are hereunto subscribed, do hereby associate ourselves together for the purpose of forming a corporation under the provisions of the laws of the State of Missouri, Chapter XII. Article IX. Revised Statutes of 1899, and for that purpose state:

First: The name of the corporation shall be the Rialto Grain and Securities Company.

Second: The principal office of the corporation shall be located in the City of St. Louis and State of Missouri.

Third: The capital stock of this corporation is Twenty-five Thousand Dollars ($25,000.00), divided into two hundred and fifty shares (250) of the par value of One Hundred Dollars ($100.00) each; the same has been bona fide subscribed and is full paid up

in lawful money of the United States and is in the custody of the persons herein after named at the first Board of Directors.

Fourth: The names and places of residence of the several shareholders and the number of shares subscribed by each are as follows:

| Names | Residence. | No. of Shares. |
|---|---|---|
| Joseph S. Lightholder | St. Louis, Missouri | 200 |
| H. D. Nisbet | St. Louis, Missouri | 1 |
| Lawrence Talley | St. Louis, Missouri | 47 |
| C. A. Smith | St. Louis, Missouri | 1 |
| Frank A. C. MacMannus | St. Louis, Missouri | 1 |

Fifth: The business of this corporation shall be managed by a Board of Directors composed of five (5) directors, and the following named shareholders shall constitute the Board of Directors of this corporation for the first year: Joseph S. Lightholder, H. D. Nisbet, Lawrence Talley, C. A. Smith, Frank A. C. MacMannus.

Sixth: This corporation shall continue as a body corporate for the term of fifty (50) years.

Seventh: The purposes for which this corporation is formed are to buy, sell and deal in all kinds of grain, seeds, cereals, pro-
73 visions, cotton and bonds and securities of all kinds except stocks of other corporations on its own account or acting as agents for others, to do a general brokerage business, to own real estate, and to buy, sell and deal in same on its own account or for others, to build, lease, own, operate, and control elevators and warehouses in the State of Missouri or elsewhere, to do a general merchandise business and to do generally whatever may be necessary to carry on its business.

Eighth: The first meeting of the stockholders of this corporation for the purpose of adopting by-laws and for the transaction of any other business which may be brought before them will be held at the office of the Company in the City of St. Louis on the 5th day of September, 1902, at nine o'clock A. M. In witness of all of which the said parties have hereto set their hands and hereunto affixed their seals this 2nd day of September, A. D. 1902.

JOSEPH S. LIGHTHOLDER. [SEAL.]
H. D. NISBET. [SEAL.]
LAWRENCE TALLEY. [SEAL.]
FRANK A. C. MACMANUS. [SEAL.]
C. A. SMITH. [SEAL.]

STATE OF MISSOURI, *City of St. Louis, ss:*

On this 2nd. day of September, 1902, before me personally appeared Joseph S. Lightholder, H. D. Nisbet, Lawrence Tally, C. A. Smith and Frank A. C. MacManus, to me known to be the persons described in and who executed the foregoing instrument and ac-

knowledged that they severally executed the same as their free act and deed.

Copy of Seal. William McNamee, Notary Public, City of St. Louis, Mo.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal at my office in the City of St. Louis, Missouri, the day and year above written.

74

WM. McNAMEE,
*Notary Public.*

My term expires July 23rd, 1903.
Filed and recorded September 4th, 1902, at 10:47 A. M.

WM. H. HAHN, *Recorder.*

STATE OF MISSOURI, *City of St. Louis, ss:*

I, the undersigned Recorder of Deeds for said City and State, do hereby certify the foregoing to be a true copy of the articles of incorporation of the Rialto Grain and Securities Company, together with the acknowledgment and date of filing and recording thereof, as the same remains of record in my office in Book of Corporations No. 19, page 543.

In Witness Whereof, I have hereunto set my hand and official seal this 4th day of September, A. D. 1902.

[SEAL.] WM. H. HAHN, *Recorder.*

Filed and certificate of incorporation issued Sep. 5, 1902.

SAM B. COOK,
***Secretary of State.***

75 Counsel for the government next offers in evidence the rules and regulations of the Post Office Department, to-wit: Secs. 34, 43, 44 and 45.

Counsel for the government here reads the above named sections. These sections are in the words and figures following, to-wit:

Sections 34, 43, 44 and 45 of the Postal Law and Regulations.

SEC. 34. (The Postmaster-General may appoint) fifteen (post-office) inspectors in charge of divisions at (a Salary of) two thousand five hundred dollars per annum (each) without per diem; fifteen inspectors at two thousand two hundred and fifty dollars per annum (each) without per diem; and fifteen inspectors at two thousand dollars per annum (each) without per diem.

NOTE .....

SEC. 43. Post-office inspectors are under the direction of the Fourth Assistant Postmaster-General, and subject to the immediate control of the Chief Post-Office Inspector (see Sec. 20), who is charged with the assignment to duty and general direction of the force and the supervision of all matters pertaining to this branch of the service.

2. The service is organized into sixteen divisions each in charge of an inspector in charge, who will direct the work of the inspectors

assigned to his division. All communications must be addressed and sent to the inspector in charge, and through him all orders will be given, unless, to save time in special cases, they are communicated directly from the Department by the Postmaster-General, Fourth Assistant Postmaster-General, or Chief Inspector, in which event the inspector in charge will be notified.

76 3. The headquarters of the several Divisions of post-office inspectors are as follows:

*g*. For the division embracing the States of Missouri (except the City of Kansas City), Iowa, and Arkansas: St. Louis, Mo.

SEC. 44. Post-office inspectors are the special representatives of the Postmaster-General. They are charged with the investigation of post-offices and all matters connected with the postal service, and with keeping the Department advised as to the condition and needs of the service. Alleged violations of law are to be investigated and reported upon by them, and they will, when necessary, aid in the prosecution of all criminal offenses.

2. Postmasters, clerks, employees, contractors, and others connected with the postal service are subordinate to post-office inspectors when acting within the scope of their duty and employment. But no arbitrary power is hereby conferred upon them. They are not to interfere with any officer or employee who is in the proper discharge of his duty further than to examine his methods, system and accounts, or any complaints which may be made against it. Nor are they to interfere with the mails or the transportation thereof, except as expressly authorized by law, and as permitted by the regulations.

3. Inspectors are intrusted with keys to the several mail locks in use, and are empowered to open and examine mails whenever and wherever they may find it necessary. They are authorized to enter and inspect post-offices at all times and to make such other inquiries and investigations as the interest of the service may demand.

4. Commissions are issued by the Postmaster-General to all inspectors, and they are required to exhibit them as evidence of their authority.

77 SEC. 45. Special regulations for the instruction and government of inspectors are prescribed in the book of instructions, which is confidentially furnished to each inspector. Obedience and conformity to these regulations and the strict preservation of their secrecy are enjoined.

The COURT: What you have just read constitutes part of the regulations which the Postmaster General issues and promulgates for the instruction and guidance of his subordinates. Is that right?

Colonel DYER: Yes, your Honor.

Colonel DYER: I offer to read Section 50 of the directions issued to Postoffice Inspectors under this authority of the Postmaster General.

The COURT: Those are spoken of as "confidential instructions" to distinguish them from the others?

Colonel DYER: It says, "Instructions to Postoffice Inspectors Concerning their Powers and Duties, issued September 1, 1899."

The COURT: You may read it.

Counsel for the government here reads Section 50, Instructions to Postoffice Inspectors.

Section 50 is in the words and figures following, to-wit:—

*Instructions to Post Office Inspectors, Concerning Their Conduct, Powers and Duties.*

SEC. 50. Fraud Orders. Reports Recommending Them.—The Postmaster General is authorized, upon evidence satisfactory to him, to issue an order forbidding any postmaster to deliver any ordinary or registered letter or other mail matter or to pay any money order to any person or firm engaged in conducting any lottery or gift enterprise, or any scheme or device for obtaining money or prop-
78 erty of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, and directing that such letters and other mail matter be stamped "fraudulent" and returned to writer, if known, or sent to the Dead-Letter Office. Such fraud orders, however, do not cover mail matter under the frank of a Senator or Representative, or under any official envelope; nor do they apply to mail matter not under seal which, on examination, is found not to pertain to the inhibited business.

In every case where the investigation shows that any person or firm receiving mail at any office is so engaged in conducting a lottery or gift enterprise, or a scheme or device for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, the inspector should at once make a full report to the inspector in charge of his division, giving in detail all the facts and recommending that a fraud order be issued against such party or firm. When several firm names or several persons are concerned, the report should state definitely each name and the post office at which the fraud order should be made operative.

The report of the inspector must make such a clear and full showing of the illegal or fraudulent character of the business in question that the Department will have no difficulty in reaching a proper and definite conclusion. All documents, advertisements, and correspondence necessary to a correct understanding of the case should accompany the report. All false or fraudulent pretenses, representations, or promises should be pointed out, and the facts as to specific instances where parties have actually been defrauded stated in detail.

As correspondence and other material documents in such cases frequently become voluminous, the inspector should before making his report, carefully arrange all such papers as are material to the consideration of the case in a way that will make them convenient
79 for examination. Papers relating to a particular transaction must — fastened together in chronological order, and each separate set of documents should be folded and marked as an exhibit, with a letter or number and with name or designation of the contents. If, after the Department acts on the question of a fraud order, any or all of the papers are needed for use in court, they will be returned at request of the inspector.

The authority to prohibit the delivery of mail matter or payment of

money orders is conferred only on the Postmaster General, and must never be assumed by an inspector. In cases where it may seem necessary that such action be immediately taken, the inspector will communicate by wire with the inspector in charge of his division, who may advise the Department, stating briefly the reasons for the action desired, and a temporary order can then be issued by the Assistant Attorney General for the Post Office Department, through the inspector, pending a consideration and hearing looking to the issue of a formal order.

Mrs. BELLA EVANS, a witness of lawful age, being duly produced, sworn and examined, on the part of the United States, testifies as follows:

Direct examination by Col. D. P. DYER:

Q. What is your name?

A. Mrs. Bella Evans.

Q. Where do you reside?

A. Albany, N. Y.

Q. How long have you lived in Albany, N. Y.?

A. Sixteen years.

Q. Are you married or single?

A. Married.

80 Q. I show you a letter directed to the Postmaster General, Washington, D. C., from 856 Third Street, Albany, N. Y. and ask you to look at that letter and say whether you wrote that letter to the Postmaster General.

A. (After examining paper). I did.

Q. Was that letter mailed by you at Albany, N. Y.?

A. Yes sir.

Q. This letter does not seem to be dated. Have you any independent recollection of the date of that letter? The date stamped upon this letter, you have no personal knowledge, of that, have you?

A. The stamp?

Q. This stamp (indicating postoffice stamp) was not on the letter when you sent it?

A. No sir.

Q. This letter was written by you and placed in the United States mail?

A. Yes sir.

Q. My associate calls my attention to the fact that the date is down at the bottom of the letter, October 28th. Is that in your writing?

A. (After examining letter.) Yes sir.

Q. Is that the time when this letter was written?

A. Yes sir.

Counsel for the Government here offers in evidence the letter referred to.

Counsel for defendant objects on the ground that the letter is incompetent, and states that the only thing competent would be to show there was a letter received and an inquiry instituted by the Postmaster General.

That it is not shown that the defendant had any knowledge of the

contents of this letter; and counsel states he does not think that will be shown.

81 The COURT: You expect to follow this up?

Col. DYER: Yes, by showing the receipt of this letter at the Postoffice Department.

The objection is overruled.

To which ruling of the Court the defendant, by his counsel, then and there, at the time, duly excepted.

Counsel for the government here reads the letter identified by the witness.

Which letter is in words and figures following, to-wit:

(Stamped) P. O. Department. Div. of P. O. I. & M. D. Distributing Desk. Nov. 3 1902. Received Washington, D. C.

856 THIRD STREET, ALBANY, N. Y.

Postmaster General, Washington, D. C.

DEAR SIR: I wish to draw your attention to a matter which seems to me to come under your jurisdiction.

On Oct. 16th I mailed to the Rialto Grain & Security Co., Rialto Bld., Mo., a New York draft on the Albany Co. Bank of $30. thirty dollars for investment. They have failed to notify me of receipt of draft and I have written them letters which they refused to answer. Will you kindly trace the same and oblige

BELLA EVANS,
856 *Third St., Albany, N. Y.*

Oct. 28th, 1902.

82 The COURT: This letter, gentlemen of the jury, as well perhaps as some others which may follow it, is admitted in evidence only for the purpose of showing that there was a proceeding pending before the Postmaster General in respect to whether the Rialto Grain & Securities Company was abusing the mail privilege, within the meaning of the charge of the indictment. The letter is not admitted in evidence for the purpose of establishing the truth of that which is stated in the letter, because that is a matter foreign to our present inquiry.

Q. (Col. DYER resuming) Now, I will get you to state whether or not, you in fact sent through the mail to the Rialto Grain & Securities Company, the draft for Thirty Dollars which you mention in that letter.

Objected to because that is clearly incompetent. That goes into a separate inquiry. That goes to the substance of the matter stated in the letter.

The COURT: We will not inquire here whether or not the Rialto Grain & Securities Company was in fact conducting a scheme or artifice to defraud and to obtain money through the mails by fraudulent pretences. It is sufficient for the purpose of this case that we inquire whether or not there was complaint made to the Postmaster

General that it was conducting that sort of a scheme, and that the Postmaster General undertook to investigate that matter.

The objection is sustained.

83 Mrs. KATHERINE C. HOUTS, a witness of lawful age, being duly produced, sworn and examined, on the part of the United States, testified as follows, to-wit:

Direct examination.

By Col. D. P. DYER:

Q. Please state your name?
A. Katherine Canfield Houts.
Q. Where do you live?
A. Albany, N. Y.
Q. How long have you lived in Albany, N. Y.?
A. Since 1901.
Q. I will show you a letter dated Albany, N. Y., and directed to the Postmaster General at Washington, D. C., and ask you to look at it and state whether you wrote that letter and mailed it at Albany, N. Y.
A. (After examining paper) That is my writing, I wrote it.
Q. Do you recollect the date when you wrote that letter?
A. It was the latter part of October or the early part of November, 1902.
Q. Your letter states, "October 30", without the year: Do you recollect the year?
A. 1902.

Counsel for the government here offers in evidence the letter identified by the witness.

Counsel for defendant states that comes within the scope of the ruling of the Court.

84 The COURT: The letter may be taken along the same line as the other, for the purpose of showing that a complaint was made against the Rialto Grain & Securities Company; and, therefore, there was something for the Postmaster General to investigate.

Counsel for the government here reads the letter identified by the witness.

Which letter is in the words and figures following, to-wit:

(Stamped) P. O. Department, Div. of P. O. I & M. D., Distributing Desk, Nov. 1, 1902, Received Washington, D. C.

ALBANY, N. Y., 856 Third St.

Postmaster General, Washington, D. C.

RESPECTED SIR: Through our local P. M. I have made formal complaint of the Rialto Grain & Security Co., of St. Louis, Mo. One of your inspectors was in the Albany office at the time and through an employee of the office advised me to write you stating the case. The parties named have swindled me in the sum of $50 sent them. They made false quotations and utterly ignored my instructions and

my demands for the return of my money. They utterly refused to answer my letters. They sent a slip of paper inclosed in one of their letters stating that if I returned same with remittance they would guarantee me six hundred per cent within 10 days on Dec. corn. I sent $50 only to be swindled. I have a son in the 8th Cav. Troop U. S. A. whom I wanted to visit and hoped thus to gain the means to do so. Will you kindly have the P. M. at St. Louis investigate. I Will go before a magistrate and make oath to my statements if necessary.

85 Yours very Respect., MRS. K. C. HOUT.

ARTHUR M. ALLEN, being duly sworn, testifies as follows, on the part of the United States:

Direct examination.

Mr. DYER.

Q. State your name if you please?
A. Arthur M. Allen.
Q. Where do you live?
A. New Brighton, Staten Island.
Q. What is your business?
A. Custom House Liquidator.
Q. How long have you been engaged in that position?
A. Eighteen years.
Q. I show you a letter dated New Brighton, Staten Island, addressed to the Post Master General—having no date on the letter beyond the date of its receipt—and I will ask you to look at that letter, and papers attached to it, and say whether you wrote that letter, and whether you sent the papers attached to your letter to the Post Master General?
A. Yes sir, I received these papers and transmitted them.
Q. Were they transmitted with your letter that you have in your hand?
A. They were transmitted with that letter.
Q. With your letter?
A. With the letter, yes sir.

Mr. DYER: Now I offer this letter and the papers attached to it in evidence.

Mr. LEHMANN of Counsel for Defendant: I object to that—I believe you did not call attention to the date.

Mr. DYER of Counsel for the State: I will follow up the date.

Mr. LEHMANN of Counsel for Defendant: I want to call the attention of the Court to the date, which I assume will not be questioned, it is dated December thirtieth——

86 Mr. DYER: This was received December thirtieth at the Post Office Department.

The COURT: What year?

COUNSEL FOR DEFENDANT: 1902. Now I want to object to those papers and the letter to which they are attached, for the reason that that letter was never call-, in any manner whatsoever, to the attention

of the Defendant, and it cannot be shown that he ever knew of its existance. It was written long after the date of the alleged agreement that is charged in four of the counts, and long after the matter was sent out here. Of course, all this comes down to the question that there can be no foundation laid for its introduction. The Defendant was never advised of its existance in any wise, and it certainly is not competent evidence against him when he did not know of its existance. The other two letters—the fact that there were such letters was called to his attention. The question with respect to this phase of the case is simply whether there was a proceeding pending; the Court has so held, and where there is the question—where that is the question—it is neither necessary nor proper to bring in all the evidence that may have been accumulated, or the material that may have been accumulated in that proceeding. I make that objection also.

Mr. DYER: There is no question about the date; the Government holds the letter—that this is competent testimony in the course
87 of the trial. I can prove but one thing at a time—that these complainants, coming in from time to time during the time when this case was under consideration by the Post Master General, became part and parcel of the case that he was investigating, and that each of the papers are given the same number as the original complaint, and form part and parcel of the original record as made up at Washington.

The COURT: The objection will be over ruled and the defendant's exception noted. These letters and the accompanying papers will be admitted in evidence only for the purpose before indicated.

As to the matter of he date: the period covered by the indictment is from some time in November 1902 until some time in March 1903. This letter falls between those two dates. Upon the statement of the Prosecutor, that he expects to show that other complaints came in from time to time between those dates, and that they became a part of the first case, so to speak, the objection will be denied. There is one other observation I want to make in that connection:

I am not sure that the Defendant should have had specific
88 knowledge of each specific complaint; it may be that it was anticipated that complaints would be made—and therefore, that his employment was to cover whatever were made—upon that, there will be a method of either eliminating the testimony, or properly directing the Jury's attention to it later when we have the full case—but, at this time, you may introduce these papers.

To which ruling of the Court, Defendant, by Counsel, then and there duly accepted.

Thereupon Counsel for the Government read in evidence to the Jury the letter referred to, together with the papers attached thereto. The letter, being in words and figures as follows to wit:

"NEW BRIGHTON, STATEN ISLAND.

Post Master General,

DEAR SIR:—When the enclosed circular and book came to my address, my first impulse was to destroy them, but, it occurred to me,

that they might be liable for using the Mails for evil purposes, so they are herewith enclosed.

Yours truly, ARTHUR M. ALLEN."

NOTE.—Thereupon Counsel for the Government read the Jury letter dated St. Louis, Missouri October twenty-second 1902, together with booklet, which is hereafter identified as part of the previous record in his case, in words and figures as follows to wit:

(Here insert above)

89 (Stamped on the Back):

P. O. Department. Received Dec. 29, 1902. Office of the Chief Clerk.

Hugh, C. Dennis, President, Pres't Dennis Underwriting Agency; Wm. M. Leftwich, Vice-President; W. D. Mahaney, Secretary; George F. Munsa, Treasurer; F. B. Weeks, Cashier; John H. Hundley, Gen'l Manager; Taylor & Harlan, Counsel.

Rialto Grain and Securities Company,
Incorporated.
Grain, Cotton, Bonds and Provisions.

Special References:
The Tilden Company, St. Louis.
Kastor & Sons Company, St. Louis.
Skinner & Kennedy Company, St. Louis.
The Barr & Widen Mercantile Agency Company, St. Louis.

Bankers:
Fourth National Bank.
Commercial Trust Company.
Germania Trust Co.

Telephones: Kinlock, 1747 Bell; Main, 3074.

Orders Executed on Margins
Private Wires.

Suites 202, 208, and 214 to 224 Rialto Building.

ST. LOUIS, Mo., *October* 22, 1902.

A. M. Allen, New York, N. Y.

DEAR SIR:—We take pleasure in providing you with the booklet enclosed. One hour of your time given to it, if you will follow the suggestions contained therein and make an investment in December Corn, may prove the old adage that "time is money" to your entire satisfaction.

We have made enormous profits for our customers within the past six months in corn deals. We expect to meet with even greater success in December corn. We would like you to be one of our early investors. Buy now, while the price is extremely low, and your profits will be all the greater.

90 Why Buy December Corn?

Because: December corn to-day is selling around 52 cents; while, under existing conditions, with Armour absolutely in control, we believe it will sell at 75 cents or higher before the first of the year.

Because: December corn to-day is from 6 to 7 cents under cash corn, while at the same time last year it was selling at a premium over October corn of 2½ cents.

Because: December corn means Old corn, and the stocks of Old corn in this country have not in twenty years been as low as at the present time. There is not even enough old corn left to supply the manufacturing industries in this country alone for sixty days. Do not overlook the astonishing fact that there is now being manufactured over sixty food products wholly from corn.

Because: The extreme lateness of the season all through the corn belt, together with damage to the growing crop from frost and continued rains absolutely prevents any new crop of corn grading before the end of December next. With continuance of bad weather these damage reports are daily growing worse, and from many sections are really alarming as to the extent of damage already irreparable done.

There are many other reasons why the purchase of corn for December delivery at this time should be put before you, but the above and those set forth in our booklet are, we believe, sufficient to prove our contention that a purchase at this time of corn for December delivery will return you enormous profits. Wire your order to buy December corn, and let your remittance follow by mail.

Very respectfully yours,

RIALTO GRAIN AND SECURITIES COMPANY,
HUGH C. DENNIS, *President.*

91 Which pamphlet is in words and figures following, to-wit:

How a Modest Fortune May be Made from a Small Investment.

"Golden Grain from Golden Grain."

Introductory.

To those who are properly ambitious and desire to secure a fair proportion of the country's wealth by legitimate business methods, who will reason and think for themselves, this little booklet is respectfully dedicated.

That speculation is legitimate needs no argument, as there is no line of business known which is not speculative, from the great Life Insurance Companies who speculate on the length of your life, to the little Grocer who buys a quantity of sugar or coffee, feeling that he can sell same at a profit. The world's greatest Markets, the Chicago Board of Trade, and the New York Stock and Cotton Exchanges have presented opportunities within the past year from which, on small beginnings, great fortunes have been made by judicious investment at the right time.

A careful perusal of the following pages will convince you, we believe, that our views are logical and conservative, and that an investment made along the lines we suggest, will produce for you tremendous profits within the next sixty days.

Respectfully,

RIALTO GRAIN & SECURITIES CO.,
*214 to 224 Rialto Building, St. Louis, Mo.*

92 Rialto Grain & Securities Company.
Incorporated.
Grain, Cotton, Bonds and Provisions.
Orders Executed on Margins.
Private Wires.
Suites 202, 208 and 214 to 224 Rialto Building, St. Louis.

Hugh C. Dennis, President.
President Dennis Underwriting Agency;
Wm. M. Leftwich, Vice-President,
W. D. Mahaney, Secretary;
George F. Munsa, Treasurer.

Bankers:
Fourth National Bank.
Commonwealth Trust Co.
Germania Trust Co.

Special references:
Kastor & Sons Company, St. Louis.
Skinner & Kennedy Company, St. Louis.

Any information you desire as to our financial standing will be furnished you by the Barr & Widen Mercantile Agency Company, whose address is 514-516 Commercial Bldg., St. Louis.

They have made a thorough investigation of our Company, and can give you an intelligent report, free of charge.

## $5,850 in Two Months.

Can you make $5,850 in two months? If so, stop right here, for this terse tale is not meant for you. Otherwise—otherwise.

$5,850 is a lot or a little money, it depends on how long and how hard you work for it. May be you are clever enough to save, say, $1.00 per day. If so, in sixteen years you will have $5,850.

93 Remember, it is not what you make but what you save out of what you make. Or may be you have a clean, comfortable business that nets you a solid, substantial sum, not in a two month but in a twelve month.

If so, you are worth about $97,000.

Unfortunately, some of us haven't the $97,000 profitably, or even unprofitably, invested, and others of us just don't want to wait sixteen long, saving, scraping, suffering years.

## A Small Investment.

Let's invest $100 and see what happens, for you must invest to make money.

No one ever became even modestly rich simply working for someone else. You must use other people's hands—other people's brains.

Real estate would be a pretty good investment if you could get in on the ground floor on any active market, but $100 won't buy very many city lots or country plots, and $100 won't buy much of a stock for a store.

There is, however, a fruitful field where a reasonable amount of capital can be quickly turned over into positive profits if it is judiciously and intelligently invested.

We mean the purchase of any of the great staples in the commercial world whose values are constantly shifting, now increasing, now decreasing, depending upon the thousand and one governing conditions of each day, of each hour, of each minute.

Fortunes are made between dawn and dark by those who know and—act quickly. He who hesitates is lost.

Yes, it is speculation—but what business is not more or less speculation? Life insurance is a speculation on whether you die today, to-morrow or next year.

A clothier speculates in selling the fads and fancies of wearables. A new doctor takes chances—"patient" chances. The banker
94 runs real risks on his loans. Every business enterprise contains an element of doubt—a business chance.

Viewed in the light that nine out of every ten men who go into business fail, investments on the Chicago Board of Trade or the New York Stock and Produce Exchange are far from "Wild" speculations.

## Just Business Judgment.

Of course there are foolhardy speculations just as there are rash business ventures, but you take no unusual business chances if you use usual business judgment.

With $100 as a beginning, $5,000 or $50,000 profits can be made if you get in on the right thing—at the right time—with the right kind of brains behind it. There isn't any guess work or theory or supposition about this, just hard, cold-blooded facts—here they are:

"On June 15th, 1901, a client of the firm deposited with me, at my suggestion, one hundred dollars, to be invested in corn for September delivery. I purchased for his account 5,000 bushels at 43½c per bushel, with a margin of 2c per bushel, and we sold his holdings at 47c, giving a profit of $175.00. This added to the principal gave $275.00. I purchased again at 47½c per bushel, 10,000 on a 2c margin, investing $2.00, leaving a balance on hand of $75.00. I resold at 50c, making a profit of $250.00, which, added to the former amount, made $525.00. On a decline from 50c to 49, I bought 25,000 bushels at the low figure, 49c, and resold at 54¾c, making a profit of

$1,425.00. This made the capital then $1,950.00. The price of corn then broke back to 50c, and at that price I bought 50,000 bushels. This I sold at 57c, which gave a profit of $3,500.00, which, added to the former capital, made the account on hand $5,350.00.

Realizing at that time that the drought was likely to be
95 broken at any time and that the price of corn would drop as soon as there were signs of rain, I drew out of the market all of the above funds, with the exception of $500.00, with which I bought 10,000 bushels of corn at 56c. Corn continued to advance and I sold at 62c, making a total profit of $600.00. This added to the amount already on hand, gave $5,950.00, or a net profit of $5,850.00 in two months on an investment of $100.00."

CHARLES H. BROOKS.

Subscribed and sworn to before me this fifth day of December, 1901.

GUILLEMINE E. TREDWAY,
[SEAL.] *Notary Public.*

My commission expires April 5, 1903.

"Under oath, I make the following statement, it being true to the best of my knowledge and belief. On the 23rd day of March I deposited $25.00, to be invested in corn and handled as the judgment of its officers might dictate. On that date there was bought for me 1,000 bushels of corn at 59c, protected with a margin of 2½c a bushel, and afterwards sold on the 12th of April at 61½c, giving me a profit of $25.00, or a total credit of $50.00. On the same date they again bought for me 2,500 bushels of corn for July delivery at 61⅜c, and again sold on April 14th at 62⅞c, giving me a profit of 1½c a bushel, or $37.50. On the same day they again bought for me 4,375 bushels of corn at 62¼c, protected with a margin of 2c a bushel, and on the 16th again sold at 63¼c, giving me a profit of $43.75, which added to my former credit, gave me a total credit of $131.75. On the 16th they again bought for me 6,562 bushels at 63c, protected with a margin of 2c a bushel, and sold on the 23d at 66c, realizing a profit of 3c a bushel, or a total of $196.86, which added to my former capital gave me a credit of $328.18, less $25.00 my original investment, leaving me a total net profit of
96 $303.10 in twenty-eight days on an investment of $25.00."

Subscribed to this 13th day of April, 1902.

R. RAY BRYAN, *Deer, Mo.*

Subscribed and sworn to before me this 23d day of April, A. D. 1902. My term expires February 12th, 1903.

JANE M. WHITELAW,
[SEAL.] *Notary Public.*

You can't dodge these firm facts. The experience of these men is simply evidence of what we have done. And isn't it logical to conclude what we have done for others we ought to be able to do for you, and do it in corn, too?

## Why Corn?

We want to say in big black type, the very same thing can be done again in corn—done to-day.

For the next four months corn will offer more attractive speculative opportunities than any other commodity, bar none. We are so absolutely sure of this that we make these two prophecies.

First: Cash corn will not sell again for less than 40c per bushel, *no* matter how large the crop may be.

Second: Corn will sell for $1.00 by December 30.

Early last summer we became thoroughly convinced that an irresistable advance movement of corn was under way. We told the public so. We asservated that prices would reach top figures before the new crop was harvested.

The correctness of our position has been unalterably demonstrated by the events of the past few weeks.

When the price was 35c we predicted a quick rise to 48c, that in June prices would be 70c, and in July, 1902, as high as 75c.

Were we right? If you know anything of the corn situa-
97 tion during the past eight months, you have already been convinced that we were.

## Millions Made.

Millions in profits were taken at 90c, then the market eased off considerably in line with the policy of the forces behind the movement.

The uninitiated is liable to conclude that 1902 corn has passed into history and that there will be "nothing doing" during the remainder of this year.

This is an unmistakable error for at least two very good and sufficient reasons:

First: Present supply and demand.

Second: Pending manipulations.

## Crop Conditions.

The average American corn crop aggregates over two billion bushels. This is more than 80 per cent of all the corn produced in the entire world.

Until 1896 but 3 per cent of the United States corn crop was exported, and up until that time price range was from 20c to 25c per bushel—except as unusually short crops naturally elevated valuations.

In 1890 we exported thirty-one million bushels. Last year we exported two hundred and ten million bushels, an increase of 700 per cent in twelve years; yet, with all this magnificent growth, not more than 25 per cent of the corn crop is ever shipped in its natural state out of the location in which it is grown.

## Corn Consumption.

It is universally conceded that America supplies the meats of the world. And it takes corn to fatten hogs and cattle, more of it every day. Ten years ago when man ate corn it was meal or hominy; to-day it is served up in dozens of different dainty, appetizing ways.

98 Corn is the basis of forty-seven food and one hundred and eight commercial products. The pure food movement which is sweeping the country from stem to stern offers numerous new and interesting ways of increasing the consumption of corn products.

## Foreign Trade.

Abroad, much missionary work is done in the name of corn. The Continental peoples are overcoming their prejudices for the "cattle food," and are finding American maize a luxurious and indispensable article of daily diet.

In the Mississippi Valley an organization has been in active existence for promoting the use of corn as an article of food abroad. To-day, *corn* is king, not *cotton*.

## Manufacturing Necessities.

The manufacture of glucose or "grape sugar" will illustrate the increased demand for corn. The glucose exported from this country in 1890 was worth $850,000; last year we sold to foreign nations an amount of this product worth $3,600,000. In the meantime our export of starch increased from $475,000 in 1890 to $2,640,000 last year.

From every highway and byway of the world comes a call for corn. Though prodigious is the annual output of our vast expanse of waiving, rolling fields, the insistent, persistent cry for still more corn is eating away the surplus margin at an alarming rate.

Alarming from an agricultural viewpoint, because the total area suitable for the profitable production of corn is almost totally utilized.

There can be no material enlargement of acreage, and of course the yield per acre depends entirely upon the season.

Thus, the crop is no greater than that of 1899; in fact, during the past twelve years the supply has been almost uniformly the same.

99 Stop a moment and weigh well what this means: Production is reaching the maximum, while consumption is just leaving the minimum.

In the last five years there has been an increased demand for corn of over four hundred million bushels, entirely apart from the demand for this cereal as an article of human food, and it is the human food feature that will hold public attention from now on.

## Present Prospects.

With such future prospects let us turn to the immediate and present crop prospects.

Those who live in the grain belt and raise feed or corn and those who have investigated the corn markets and general grain situation, know that the drought of last summer which swept the heart of the corn district of the Central and Western States was the most blasting and devastating those sections ever experienced. Instead of just an average crop of over two billion bushels, the output was only one billion two hundred million bushels; a shortage of a full billion bushels.

When two billion bushels are insufficient to supply the growing demand, what must be the actual condition with such a startling shortage?

Very little corn is carried over from one year to the next. Even in 1890 the crop was under average and a very small amount held until 1891.

The last Government report estimated the total amount of corn left in the hands of the farmers at five million bushels. Upon this utterly inadequate surplus must fall all the home and foreign demands until the new crop is harvested and marketed, which WILL NOT BE UNTIL THE FIRST OF DECEMBER at the very earliest.

The manufacturing interests such as starch, glucose and food products need twice that amount and more.

100 Even the man who seldom thinks more than four times a minute can't fail to realize that those who must have corn will be compelled to pay for it just as all of us will be compelled to pay for hard coal this winter because of curtailment of production. And those who have corn to sell will simply reap a harvest.

Corn is bound to boom. It will reach higher prices than it ever has within the last twenty years, and during these two decades the $1.00 mark has been reached more than once or twice.

In 1892, with a crop amounting to one billion six hundred million bushels, or four hundred million bushels more than last year's crop, corn reached $1.48 per bushel.

If now is not the time to buy corn when is it the time?

## Manipulation Affects Prices.

These natural causes, sufficient in themselves to offer speculative opportunities of a life time, are simply the foundations for one of the biggest deals the produce world has ever known. Shrewd, successful operators keenly realize the true inwardness of the situation and have manipulated corn, taking profits at will. They are now prepared to put prices up at the opportune time.

In 1892 George H. Phillips, previously unknown to fortune and to fame, cornered corn with a capital of less than one hundred thousand dollars, and earned the sobriquet of "King Corn."

The members of the syndicate that to-day hold the corn situation in the hollow of their hands are the most successful speculators of

Chicago, New York and St. Louis. Where Phillips had thousands they have millions.

The Recent "Bull."

During the first months of this year the syndicate sold
101 large quantities for May delivery, and by thor-ing their holdings on the market at a propitious period succeeded in keeping prices far below figures justified by the real conditions.

This depressed May corn and had the ensuing effect on July and September deliveries.

Gates and his associates openly sold corn for May delivery but secretly purchased immense quantities for future deliveries. It has been reported from sources always credited as reliable, that the syndicate alone now holds more than fifteen million bushels for December delivery. In addition, these clever speculators have most of the cash corn of the country, which they secured on their July contracts. The result is, they have the market by the throat and when their plans are ripe, they can and simply will dictate their own prices.

The Natural "Bull" Season.

The syndicate is particularly, fortunate in the period of their operation, for September, October and November are the natural "Bull" months of the year. Visible supplies and total supplies are always less at this period, consequently prices are more easily manipulated.

We have studied the situation from every point of view and are thoroughly convinced that in September, October and November, 1902, corn will make a new record.

It is an indisputable fact that there is far less corn and much more demand than at any corresponding period in the past twenty years.

Unless our calculations are all to the bad, there will be less than three million bushels of contract corn in December. Already ten times that amount has been sold for December delivery. That alone, without a single manipulation, would send prices skyward.

102 Don't Sell Now.

If you have corn, don't sell a single ear or a single bushel. Hold it until the last of October at the earliest. If you have a crib but not the corn, buy at once, do it to-day—don't delay. The autumn advances will come—and quickly.

Remember, contract corn will sell for $1.00 by December 31st. The new crop will have absolutely no effect or influence on the present situation, because the advance will be made before the leavening effect of he new yield can possibly be felt.

You can just cross the new crop right off the map as far as it concerns the present unusual opportunities of securing substantial returns from judicious and carefully managed speculations.

If you have any doubt about these facts, send us the doubts—we will remove them. Otherwise, send us your buying instructions at once.

## Cash Future Corn.

Cash corn is now about 58c per bushel in Chicago. If you buy the grain outright, 5,000 bushels will cost $2,400. $100 will only buy 170 bushels, and if you sell at 60c, you net the munificent profit of $3.40.

If you could do that every day of the year, which of course you can't do, it would only take you four and one-half years to get $5,850. Just about as easy as saving it. Or suppose you bought 5,000 bushels outright and held it as we advise for December delivery, you would have the expense of three months storage, insurance and handling. There would also be the loss incidental to shipping and shrinkage. Add this to the interest on $2,400, the actual cost of the corn has been increased several cents per bushel.

103 It is unnecessary to purchase the actual corn when you can make a contract to buy a certain amount at a given time and at a specified price. This is thoroughly legitimate and a daily occurrence in regular business channels.

Retailers, manufacturers and jobbers purchase stocks and materials for future delivery at an agreed upon price.

If valuations increase, as they frequently do, the purchaser makes a profit without touching a single bale of goods, then he sells the stock and has delivery made to someone else, thereby making profits as a result of his foresight and business sagacity, and all the time he never had a single dollar actually tied up in merchandise.

Of course his credit and his commercial standing was a protection to the parties agreeing to deliver. You can buy corn in exactly the same way.

Now, if it is perfectly legitimate to make such a deal in pig iron or flannels, why isn't it just as legitimate to make a similar speculation in corn? and if it is not, won't some good and kind person tell us why?

Suppose you build a house. The contractor undertakes delivery at a certain date for a certain sum. Perhaps, when the house is partially completed you sell it at quite an advance on the contract price. You turn the contract over to the third party and take your profits before the construction is completed—more speculation—no, that is just simply business.

When you buy corn futures you go through exactly the same motions as the merchant or the man who builds and sells a house. You contract for grain at a certain price. Valuations go up, so you sell your contract through the broker making the original trade. You make a profit.

While you owned the contract you protected it with a portion of the purchase price. This deposit is called a "margin" and
104 usually runs from 1c to 5c per bushel. 5,000 bushels then at 2c margin requires a deposit of $100. That is your working capital, and unless the price should drop 2c per bushel, no more would be necessary to carry on the negotiation.

When the proper time arrived, one week or three months as the case may be, you sell your contract just as you would sell the actual

corn from the cribs. Remember there is no storage, insurance or handling charges. All is clean profit. The only expense is our small commission. One eighth of one per cent per bushel for handling the deal.

Our Special Corn Proposition.

If this does not strike you as being just about the very best plan for making money out of December corn, won't you tell us so? Won't you tell us just where it seems weak to you? If there is any better or more satisfactory way of working for and with you, we want to know it—and do it.

How Much Corn Will You Buy?

$25.00 will buy 1,250 bushels of corn.
$50. will buy 2,500 bushels of corn.
$100.00 will buy 5,000 bushels of corn.
$200.00 will buy 10,000 bushels of corn.
$500.00 will buy 25,000 bushels of corn.
$1,000.00 will buy 50,000 bushels of corn.

Now, suppose you buy 5,000 bushels of December corn at 40c and protect the contract with a margin of 2c a bushel. It would be necessary for you to advance $100. Suppose we sell this corn for you at 42c, your profit will be $100 on the transaction. Later, on a reaction, we again enter the market and purchase 10,000 bushels of corn, investing your total credit of $200. This corn, let us say, we sell at 41½c. You would make a profit of $200 on the trade, giving you a total credit of $400. A little later we again buy in for you 20,000 bushels of corn at 46¼c and sell this on the advance for 48¼c, which would give you a profit of $400, and a total credit of $800. We again make a purchase at 47c, of 40,000 bushels,
105 protecting the same with $800. We dispose of this corn at 49c, making a profit of $800 and giving a total credit of $1,600. Finally we purchase at 50c, 80,000 bushels of corn and sell the same for 52c, which would give a profit of $1,600 and a total credit of $3,200, less commission.

One Hundred Dollars Will Do It.

The peculiar crop and market conditions we have just explained make it possible.

If you have $100 uninvested, or not as satisfactorily invested as it ought to be—and you know it's pretty difficult to invest from $25 to $500 profitably—you can do much worse than send it to us for December corn.

Think this over carefully and be sure you thoroughly understand just what our proposition is.

Government Bonds Versus December Corn.

If we had the choice between Government bonds and December corn, we would choose December Corn without a suspicion of hesitancy. Government bonds are sure and safe—but slow.

December corn will earn more profit in three months than 4 per cent. Government bonds in ten years.

Figure it out for yourself and then you will believe it.

Rialto Grain & Securities Co.

Naturally you ask why should the Rialto Grain & Securities Co. be especially adapted for serving your investment interests better than any one else, right at this particular period.

Incorporated in this little brochure are views taken in our general offices, 202, 204, 208, 214, 216, 218, 220, 222 and 224 Rialto Building, St. Louis, Missouri.

From the President's private office to the most obscure corner of the mailing department, our equipment and organization
106 is as nearly perfect as intelligent, watchful and progressive management can attain.

We have the experience of years and know the ins and outs of the brokerage business from corn to corn cake. We don't claim to know it all or to be infallible, but we do know just a little bit more than the average trader, and it's the fraction of a second that wins a horse race.

We don't know how to run a store or stop a locomotive, but we do know how to execute orders on margins for the financial benefit of our clients.

Some of us have spent a lifetime in the corn pit. That is one reason why corn is our specialty. There are others just as good. In fact, every man on our staff is a specialist. One knows how to do this well, while another succeeds better in another line.

Our organization is such that every man does the one thing that he is best adapted to do. We don't dissipate our energies or abilities—we don't make mistakes—well, not the same ones twice.

You not only get the actual buying and selling services of this institution, but you have the added advantages that are coupled with our knowledge and long experience.

That our methods are absolutely right is evidenced by the belief that we have more customers on our books than any other brokerage firm in St. Louis.

Our customers know that our exclusive time and efforts are devoted to watching and furthering their interests. That our agents in every section of the country are alert and active and keep us informed daily of the various local and crop conditions. That our representatives in the markets of the world have their fingers on the pulse of trade.

We know what we can do. We want you to know it.

We want the opportunity of proving that we can and do
107 get results—the only safe criterion of successful investment.

Smallest Investment.

The smallest investment you can make is $25.00. We will buy corn for you on a margin of less than 2c, in fact we will buy for you on a margin as small as 1c per bushel, but we would advise all of our customers to protect their holdings by a margin of not less than 2c per bushel. We believe that a larger margin is not needed on corn at this time.

Our greatest successes have been attained by buying on an advancing market, selling just before the market declined and investing both the principal and the profits after the reaction.

Sales Made Immediately.

All your money, principal and earnings are subject to instantaneous withdrawal—any day—any hour.

Write or telegraph and we will close your account and send the money due you within an hour, by telegraph, if you desire, or by draft in first mail.

Unlike ordinary investments, you have a commodity that you can realize on immediately.

Don't hesitate to investigate our proposition fully, for kindly understand that you will not obligate yourself in any way by the desire to know just exactly what we can do for you.

RIALTO GRAIN & SECURITIES CO.,
(INCORPORATED)
214 *to* 224 *Rialto Building, St. Louis, Mo.*

108 The COURT: You were asked in regard to the date of this letter which you were intending to prove later. Just ask in regard to that.

Q. Do you recollect—there being no date upon this letter—at what time you sent it to Washington?

A. Let me see the date of the circular and I can tell you, I think.

Q. The date of the circular—the——

The COURT: (Interrupting) Let him see it he says.

Q. (Continuing) Oh, here is the whole thing (handing witness all papers attached to the letter in question).

A. (Examining papers) This circular is dated October twenty-second. I received that about a week after, and sent the letter immediately upon receipt of it.

The COURT: You sent your letter immediately upon receipt of that circular?

A. Yes sir, I received that about a week after its date—that is, a little before November the first. I remember distinctly sending it right away as soon as I examined it.

Cross-examination waived.

109 SARAH A. WARNER, being duly sworn, testifies as follows on the part of the United States:

Direct examination.

Mr. DYER:

Q. State your name if you please?
A. Sarah A. Warner.
Q. Where do you live?
A. Pittsfield, Massachusetts.
Q. How long have you lived in Massachusetts?
A. I was born and raised there.
Q. What has been your occupation there?
A. Well I am a farmer now.
Q. You work on a farm—having a farm?
A. Yes sir.
Q. Now I show you a letter directed to the Post Master General—the date of which is a little obscure by reason of the stamps that are put on it—I show you this letter and ask you whether you wrote that letter, or not, to the Post Master General (handing witness papers) ?
A. Yes sir.
Q. Did you mail it at Massachusetts?
A. I did.
Q. You put it in the Mail?
A. Yes sir.
Q. Do you recollect—or can you tell, what date you received—what date you wrote that letter?
A. As I remember, it was somewhere along the latter part of December or the first of January—I wouldn't be positive which.
Q. The latter part of December 1902, or the first part of——
A. (Interrupting) It might have been later. I wouldn't be positive. It was in the Winter.
Q. It was written in December or January of 1902–1903?
A. Yes sir, it was.

110 Mr. DYER of Counsel for the Government: Now I offer this letter in evidence.

Mr. LEHMANN of Counsel for Defendant: I object to that on the ground that it was apparently received—from the stamp upon it—on January the seventeenth 1903, and its existance was never communicated to the Defendant, and there is nothing to show that he ever was aware of it at all; and furthermore, it is entirely unnecessary—it is neither a necessary nor proper manner to show the tendency of any matter before the Department.

The COURT: It will be admitted, in the present state of the evidence, for the same purpose as the other letters were admitted.

To which ruling of the Court Defendant by Counsel, then and there duly accepted.

Thereupon Mr. Dyer, of Counsel for the Government, read to the Jury the letter in question, together with the papers attached to it, in words and figures as follows to wit:

"Post Master General, Washington, D. C.:

I take the opportunity of calling your attention to the enclosed circulars, which are being sent broadcast through the country by the Mails. The business is not one whit more respectable than the Bucket Shop, and is more injurious than the latter. I have not been taken in, but, as a farmer, one of the most unfortunate classes of American citizens I wish to protest against the whole gamble
111 in grain and food stuffs; which injures the whole country, us poor farmers first; and benefits none. Further, I am sure the Post Office Department does not wish, or intend to lend its aid, to any such gambling schemes whose promotors should receive the same justice allotted to Card Sharpers and Green Goods Men, who are Christian gentlemen beside them.

Respectfully,

S. A. WARNER,
*Pittsfield, Massachusetts.*

Q. Was there any paper accompanying that letter?

A. I think there were two. I received two or three.

Q. I show you this booklet and ask you if that is what you have reference to in your letter which you wrote to the Post Master General?

A. There was this one (indicating booklet handed her). Then there was another one longer than that.

Q. Well, that one you identify (referring to booklet attached to the record in the original Burton case)?

A. Well I can't say it is the same one, but one similar.

Q. Well there will be no dispute about that. This booklet that I have here is attached to the original record in this case?

A. Yes sir.

Mr. DYER of Counsel for the Government: This booklet which I have shown the witness is attached to the original record in this case, and, by stipulation between Counsel at the time the booklet was put in—to save the Clerk the trouble of copying the entire booklet into the record—the booklet was fastened to said record, and that is the reason it is here now.

112 The COURT: Well she has identified it as being the same booklet which accompanied her letter. What do you want to do?

Mr. DYER of Counsel for the Government: I desire to offer it as being embraced in that letter and accompanying same.

The COURT: It may go in with the letter for the same purpose only as heretofore indicated.

Mr. LEHMANN of Counsel for Defendant: I desire to make the objection to that that I have made to the other papers of a similar nature in the testimony of the witness Allen. It is evidently offered by the witness in support of her claim, and I do not believe it is competent upon a single question here, on the pendency of a proceeding. I do not believe this record ought to be encumbered with so much matter of this nature.

The COURT: Is that a booklet purporting to have been issued by the Rialto Grain and Securities Company?

Mr. DYER of Counsel for the Government: Yes sir.

The COURT: It may go in evidence for the same purpose indicated heretofore.

Mr. LEHMANN of Counsel for the Defendant: Is it necessary for me to state in each instance that we except?

The COURT: There are times that the Court would not be conscious of the fact that you are making a point, but I understand that you are making this point and it may be preserved to you.

Mr. LEHMANN of Counsel for Defendant: I shall try to
113 make myself plain to the court that in each instance where I make an objection, and the Court over rules my objection, I desire to save my exception to the ruling.

An exception was reserved by the defendant.

Mr. DYER of Counsel for the Government: I now offer this booklet in evidence.

The COURT: It need not be taken from the record to which it is attached. Let it still remain where it is.

Mr. DYER of Counsel for the Government: I desire to introduce one other witness, though it is near your Honor's hour of adjournment.

The COURT: Then, you may defer the reading of this booklet until to-morrow morning, and introduce your other witness, providing there is no Cross Examination.

There was no Cross Examination of this witness.

FRANK RUSSELL FRAVEL, being duly sworn, testifies as follows on the part of the United States:

Direct examination.

Mr. DYER.

Q. State your name if you please?
A. Frank Russell Fravel.
Q. Where do you live?
A. Washington, D. C.
Q. What is your official position?
A. I am a clerk in the Department of Agriculture.
114 Q. How long have you been a Clerk in the Department of Agriculture.
A. About five years.
Q. I show you a letter directed to the Post Master General of date November third 1902, and ask you to look at that letter and say whether it was written by you, or signed by you, and sent to the Post Master General?
A. (Examining letter) It was.
Q. Look at the papers attached to it and say whether those papers, attached to your letter, were sent also to the Post Master General at the time you sent the letter?
A. (Examining papers in question) They were.

Mr. DYER of Counsel for the Government: Now I offer this letter and the papers attached to it in evidence.

Mr. LEHMANN of Counsel for Defendant: I object to this on the same grounds that are made to the communications and papers in the testimony of Mr. Allen and Mrs. Warner.

The COURT: The objection will be over ruled. The letter and its accompanying enclosures may be introduced in evidence for the same purpose as those that have proceeded them.

To which ruling of the Court as above, Defendant, by Counsel, then and there duly excepted.

Thereupon the Court duly admonished the Jury as to its conduct during adjournment of Court, and the Court adjourned the further hearing of testimony in this cause until ten o'clock Tuesday morning, November twenty-first, A. D. 1905, the following day.

115 ST. LOUIS, *November* 21, 1905.

Met pursuant to adjournment as above, on Tuesday, November 21, 1905, when the following proceedings were had:

Mr. DYER: I desire to introduce a witness a little out of order, to which I understand there is no objection, this witness being Sergeant-at-arms Ramsdell, whose official position requires his presence in Washington.

DANIEL M. RAMSDELL a witness of lawful age, being duly produced, sworn and examined, in behalf of the United States, testified as follows:

Direct examination.

By Mr. D. P. DYER:

Q. State your name in full, if you please?
A. Daniel M. Ramsdell.
Q. What is your official position?
A. Sergeant at Arms of the United States Senate.
Q. You are here under subpœna?
A. Yes, sir.
Q. Asking you to produce certain papers?
A. Yes, sir.
Q. In obedience to that subpœna have you brought the telegrams referred to in the subpœna?
A. I have.
Q. Have you them in your possession?
A. I have.
Q. Will you produce them?
A. Yes, sir, (witness here produces papers).

116 The COURT:

Q. How long have you been Sergeant at Arms?
A. I was elected Sergeant at Arms of the United States Senate in January, 1900.
Q. And have been in that office since that time?
A. Since that time, yes, sir.

Q. (Mr. DYER resuming) Are those the dispatches, which you have in your possession?

A. These are the dispatches (producing papers).

Q. May I ask you how these dispatches came into your possession?

A. Those dispatches came into my possession in the ordinary course of business. They come to me from the Telegraph Company, accompanied with an account against the Government. I simply then examine them—not the substance, but examine them as to the correct charges, to see that the proper mileage and proper amount of charge, and when they are verified and proved to be correct as to charges, I put them in voucher form, certify to that voucher, and they then go to the disbursing officer of the Senate, where they are paid.

Q. And out of what fund are they paid?

Objected to by counsel for defendant, as immaterial.

A. I cannot answer that question.

Q. I want to know, after these papers are sent to you, and they go through the routine that you have described, what then becomes of the papers?

Mr. LEHMANN: I submit the only thing material is to identify the papers.

The COURT: Is this a part of your identification of them,
117 to show their present custody?

Mr. DYER: Yes sir, that is a part of my identification.

Mr. LEHMANN: Perhaps we can simplify that.

The COURT: You may take a moment to see.

Mr. LEHMANN: The telegrams are all signed by the defendant. There are some notations on them which are obviously not his, and have nothing to do with the messages.

The COURT: It is admitted that the telegrams produced by the witness were sent by the defendant to the persons named therein as addressees, and at the times stated in the telegrams?

Mr. LEHMANN: It is.

The COURT: Their identity is, then, established?

Mr. DYER: Shall I have them identified by the stenographer, or will the identity already admitted as to these particular messages be sufficient?

The COURT: Let the stenographer mark them as the particular telegrams produced by the witness and identified by the admission of defendants counsel.

NOTE.—The papers referred to are marked by the stenographer as Exhibits 1 to 13, inclusive, with her initials.

Mr. DYER:

Q. These telegrams are vouchers, or a part of vouchers, in your office? Do you desire them, after they are through with being used here, to be returned to Washington?

A. Yes sir.

The COURT: The order will be made that when they shall have

served the purpose for which they are to be here used, they shall be returned to the witness.

118 The COURT: There were some papers identified last evening which were not read in evidence, in order that you might take up some witness who wanted to get away.

Mr. LEHMANN: There was only one identified, I believe.

Mr. DYER: In Mr. Fravel's testimony there were certain papers he identified as having sent to the Postmaster General at the time he sent the letter identified yesterday afternoon.

The COURT: Encloures in the letter to the Postmaster General?

Mr. DYER: Yes, sir. I will read those, and after that Mr. Robb will read the paper that had reference to the other witness.

Counsel for the Government here reads the papers offered in connection with the testimony of the witness Fravel.

Which papers are in the words and figures following, to-wit:

P. O. Department. Div. of P. O. I. & M. D. Distributing Desk. Nov. 4, 1902. Received Washington, D. C.

DEPARTMENT OF AGRICULTURE.
WASHINGTON, D. C., *November* 3, 1902.

Postmaster General, Postoffice Department, Washington, D. C.

DEAR SIR: I desire to call attention — the enclosed circulars mailed at St. Louis, Mo., in which the date of mailing is

119 blank. This is the case in all of these circulars that I have seen and it looks as though it is a case of fraud, as it may easily be said, in case of investigation, that the order was not mailed in time. Is it presumed that it is the intention of the Postoffice Department to have the date stamped on these the same as on other mail matter.

Very respectfully, F. R. FRAVEL.

(Stamped on the back:)
P. O. Department, Received Nov. 4, 1902, Office of the Chief Clerk.

Hugh C. Dennis, President, Dennis Underwriting Agency; Wm. M. Leftwich, Vice President; Wm. D. Mahaney, Secretary; George F. Munsa, Treasurer; Taylor & Harlan, Counsel.

Rialto Grain & Securities Company
(Incorporated).
Grain, Cotton, Bonds and Provisions.
Orders Executed on Margins.
Private Wires.
Suites 202, 208 and 214 to 224 Rialto Building.

Special References:
Kastor & Sons, Company, St. Louis.
Skinner & Kennedy Company, St. Louis.
The Barr & Widen Mercantile Agency Company, St. Louis.

Bankers:
Fourth National Bank.
Commonwealth Trust Co.
Germania Trust Co.

Telephones:
Kinloch A 1747; Bell, Main 3074.

120 St. Louis, Mo., *October* 29, 1902.

F. R. Fravel, Washington, D. C.

Dear Sir: A short time since we mailed you our booklet advising the purchase of December corn. At the time we mailed this booklet December corn was quoted on the Chicago market at 43 cents. Today the market price is 51 cents. An investment made then would show eight hundred per cent profit to date. Can you find any other safe investment in America which will return any such profit? We think not.

If you have any spare money, from $25 to $500, invest it in the purchase of corn for December delivery, and if your investment is properly managed your profits will be enormous.

For the past year we have devoted our time, our resources and our money exclusively to obtaining every bit of information possible regarding the corn situation. Last winter we, in the face of a falling market, predicted 75-cent corn for July. July corn sold as high as 90 cents, and such of our customers as took our advice made enormous profits.

Before the expiration of the July option our every energy was put forth to find out the true situation of corn for September and December deliveries, and on information so obtained, we predicted 65-cents corn for September. Twice since then has September corn sold above 65 cents. We now believe that December corn will sell at or above the price July corn sold for,—our reasons being that there is little or no old corn left in the country, not enough for manufacturing purposes alone for more than sixty days; and James Patten with his following and the Armour crowd of Chicago, with their friends in that city, New York and St. Louis, have since July bought over

thirty millions of bushels of corn to be delivered to them in December. Again to repeat, there is no old corn in he country to speak of, and these gentlemen who now hold corn bought to be delivered to them in December may put the price to any figure they wish. This is why we tell you to buy December corn. Buy all you can carry, and buy it at once.

We solicit your patronage, and suggest that you wire your order and let your remittance follow by mail.

Very respectfully yours,

RIALTO GRAIN AND SECURITIES COMPANY,
HUGH C. DENNIS, *President.*

Mr. DYER: The paper referred to, and a part of the record before, and identified by the witness Sarah A. Warner, I will ask Mr. Robb to read to the jury.

Counsel for the Government here reads the Booklet, entitled "Giant Oaks from tiny acorns grow."

Which booklet is in the words and figures following, to-wit:

(On the left is a picture of three ears of corn and a sprig of golden rod.) "Great Oaks from tiny Acorns grow."

"A few moments spent in perusal of this little book may mean much in the way of riches to you."

Rialto Grain and Securities Company.

(Incorporated under the Laws of the State of Missouri.)

The following, taken from the Articles of Incorporation of this Company, shows the Scope of its Authority.

Seventh: The purposes for which this Corporation is formed are to buy, sell and deal in all kinds of grain, seeds, cereals, provisions, cotton and bonds and securities of all kinds, except stock of other corporations, on its own account or acting as agents for others; to do a general brokerage business; to own real estate and to buy, sell and deal in same on its own account or for others; to build, lease, own, operate and control elevators and warehouses in the State of Missouri, or elsewhere; to do a general merchandise business and to do generally whatever may be necessary to carry on its business.

Introductory.

To the hustling American who believes in making money rather than saving, who believes in making his talent two, rather than burying his one in a napkin, to all those who have a spirit of business and enterprise this book is respectfully dedicated.

A man cannot attain great wealth by the work of his hands. Wealth now comes through the power of the brain, coupled with CAPITAL, EXPERIENCE AND OPPORTUNITY.

A careful reading of this booklet will clearly demonstrate our

business methods, will show you how your money can be invested to earn greater profits, will tell you how a little sum had made a modest fortune, using the same methods as those used by the Kings of Finance—the Morgans and the Rockefellers.

We believe this book will appeal to your sound business judgment, and trust you will consider it the knock of opportunity at your door that comes but seldom in a lifetime bringing its message of happiness and wealth.

Respectfully,

HUGH C. DENNIS,
*President Rialto Grain and Securities Company,*
*202 to 222 Rialto Building, St. Louis, Mo.*

The next page contains a picture entitled "Private Wires and Board Room."

Officers Rialto Grain and Securities Company:
Hugh C. Dennis, President,
President Dennis Underwriting Agency Co.
President East Shore Woodenware Co.
Wm. M. Leftwich, Vice-President.
W. D. Mahaney, Secretary.
Hector McRae, Comptroller.
W. H. Durham,
Wm. T. Lawrence, Assistant Secretaries.
124 Walter P. Ott, Auditor.
W. Arthur Clemes, Assistant Auditor.
Dewey A. Hickey, Manager St. Louis Department.

General Counsel.
Hon. J. R. Burton, United States Senator.
Hon. Chester H. Krum. Thomas B. Harlan.

## How Much Money Are You Making?

Are you going to play along in the same old way, day by day, month by month, the everlasting same old grind? Do you have time to enjoy life? Do you have ample money to enjoy life? Would not a little more money buy you more comforts and pleasures in this life? Wealth opens all doors and gives most of the pleasure that can be enjoyed on earth.

## Will You Grow Wealthy by Saving?

How much can you save in a year? How many years would it take you to become a J. P. Morgan? If you had been born a brother to Adam, you could not have saved enough to travel in his class. Saving will not do it. No, it takes business and business brains to make money. And what does business mean?

## Buying and Selling.

Business is from the beggar selling his little stock of shoe-strings to the purchasing of a Trans-Atlantic Steam-ship line. It takes but little brains and less capital to sell shoe-strings, but it requires the opportunity and a King of Finance to engineer the sale of a Steam-ship Line.

Of course, you will admit you can not become wealthy working for others, and maybe you have not enough money to start in business for yourself. Suppose you have $100.00, how would you make every dollar of this sum earn as much as the dollar of a capitalist? How would you start?

LET US TALK THIS OVER.—What are the best ways of making money? Government Bonds are safe, they pay 3 and 4
125 per cent per annum, your dollar makes you at the most 4 cents every year—too, slow, could never get rich this way.

REAL ESTATE.—If you buy property, it may advance in a year or more; but, then, it may not; you have to make a big original investment, your dollars are all tied up, so that it takes a rich man to make much money in Real Estate And this is just BUYING and SELLING.

And profitable manufacturing business takes a large capital to *state*. The end is the SELLING of your product.

In a merchandise business you must BUY and SELL; the quicker the sales —.

The next page contains a picture entitled President's Office.

The more times you can BUY and SELL at a profit, the more each of your dollars is going to profit you.

According to this reasoning the business that will offer the greatest number of sales in a given length of time, at the greatest profit per sale, will naturally show the greatest wealth.

It is the opportunity of buying at a low figure and selling at a high with a profit generally equal to the investment, that makes the fortunes of our multi-millionaires.

What we buy and sell must be constantly in demand; the demand must ever be in excess of the supply. So we buy and sell grain, the food supply of the world. People must eat or they die.

This, is our business. We buy and sell GRAIN. You
126 could buy or sell cash grain, pay about 45 cents a bushel for corn, but each of your dollars would not much more than buy two bushels, and as the price advances you would only make a few cents on your dollar. A better way—the way the shrewd dealers have made, and are making, their fortunes—is this: instead of buying CASH corn, they buy contracts for corn to be delivered at a future date for a certain price. In this way they cover a small portion of the price with what is termed a "Margin." This margin can be from one cent to five cents per bushel, usually two cents. Thus, instead of each of your dollars buying about two bushels of corn, each dollar buys on option for fifty bushels, and when corn advances a couple of cents, each of your dollars has made you another dollar, in-

stead of a few cents, as it would have done had you bought the actual corn at the time.

If you were fortunate enough last Spring, Summer or Autumn to receive our booklet, you know of our predictions then made. If you have been following up the market you know that these predictions were correct, though made in spite of adverse opinions of many large operators. We believed, however, that we were right and our judgment has been vindicated. We had our information from all over the corn belt, we knew the exact state of the corn crop, we knew what the demand last year was, we easily calculated the price corn would reach by December, and the customers who followed our advice *and kept their trades in force* made large profits.

127 The following letters speak for themselves, We are in possession of many hundreds of these letters, but want of space permits the publication of only a few.

Jefferson Court No. 24, Tribe Ben-Hur.

WATERTOWN, N. Y. 12–5–02.

GENTLEMEN: Yours of December 3rd received, enclosing draft for $78.63 for which accept my sincere thanks. I wrote to you last night asking reason for your delay in sending same but received yours this noon.

I feel that you did finely with my last investment of $25.00 and if we had understood each other better on my first, I can see where your handling would have made a few hundred on it which I think is sufficient to prove to anyone that your firm is sound and able.

I thank you again and hope to be able to help you to more customers and maybe myself dabble again soon.

Again thanking you for the manner of handling my account, I am,

Yours sincerely, W. J. KELLECK.

Dr. L. H. Wilson, Dentist.

ARMADA, MICH. 12–3–02.

Rialto Grain & Securities Company, St. Louis, Mo.

DEAR SIRS: Your favor of the 29th ult., rec'd and I hasten
128 to reply. I have just arrived home and am well pleased with the way you have handled my investment in December corn, and with the handsome profits, and in disposing of the same and investing it in May corn (the confirm for which I received). I wish to heartily thank you all for the conserving and kindly interest you have taken in my welfare. I have every confidence in you and your abilities. Do with the May deal as your best judgment would indicate would be the best for us, and I wish you every success in it. I also wish to thank you for sending me the "St. Louis Star."

Very sincerely yours, L. H. WILSON.

SANTA CRUZ, CAL. 12–3–02.

Rialto Grain & Securities Company, St. Louis, Mo.

GENTLEMEN: Your letter 26th ult. received together with inclosure of draft for $426.00 and please accept my thanks for same.

I am very well pleased with your manipulation of my holdings, and can find absolutely no cause for complaint; at one time my case certainly looked rather hopeless, but thanks to your suggestions on which I acted, you brought me out with flying colors, and I trust that our future business relations may prove as congenial and profitable as they have in the past.

Thanking you again for the kind and just treatment that I have received at your hands, I remain,

Very truly yours,

E. R. FOSDICK.

129 Dr. Thomas B. Drew.

OSWEGO, ILLS. 12–5–02.

Rialto Grain & Securities Company, St. Louis, Mo.

GENTLEMEN: Your check for $103.13 received. Thank you very much for prompt and courteous attention to my correspondence and dealings. I remain, gentlemen,

Very truly yours,

T. B. DREW.

GREEN SPRINGS, W. VA. *Dec. 3rd,* '02.

Rialto Grain & Securities Company.

DEAR SIRS: Yours of Nov. 24th to hand containing check for $77.82 leaving 2% margin on 1500 bu. May corn which makes nearly $400.00 on investment of $25.00 on Nov. 7th.

Hope you will make out on the May corn deal as well.

Respectfully yours,

J. A. WILSON.

WHIPPLE BARRACKS, ARIZ. *Nov. 31st,* '02.

Rialto Grain & Securities Company, St. Louis, Mo.

GENTLEMEN: I received your telegram last evening saying that you had sold the corn that I had directed (900 bu.) at 57¾. I thank you for your promptness and success with the order. If you
130 have not already done so, on receipt of this please send me the entire proceeds from this sale by check.

The balance of my holdings of Decem—

The next page contains a picture entitled Vice-President's Office.

(Letter continued)

ber corn I will hold for a try at from 60 to 65. I will watch the market, and a little later will take a small flyer in May corn.

I assure you of my appreciation of the faithful interest and good business judgment with which you have handled my investment,

and which insures me a nice little sum for Thanksgiving and Christmas money.

Sincerely yours,

C. E. HATCH,
*Capt. 18th Infantry.*

National Military Home.

OHIO, *Nov.*, 1902.

Hugh C. Dennis, St. Louis, Mo.

MY DEAR MAJOR: You are a daisy. Yours of the 21st, with account of sale and purchase, almost took my breath. $92.19 and $57.80 in such a short time on the small investment is almost beyond comprehension. Thanks to your grand success in dealing with the market. I now see my way clear to pay a debt of honor I have been wanting to pay for a long time.

131 Please remit about $50.00 by American Ex. to Dayton, Ohio, and apply the rest due me to more Dec. or May corn, as your good and almost infallible judgment may decide.

I see from purchase order that you have already bought 5,000 bu. corn (May market.)

Thanking you for your kindness, and believing you as my benefactor, I am,

Yours most truly,

E. I. REICHE.

Office of J. F. McNutly, M. D.

CALLAWAY, NEB., 12-3-02.

Rialto Grain & Securities Company, St. Louis, Mo.

GENTLEMEN: I desire to express to you my entire satisfaction with your manner of doing business with me. You have always promptly attended to my trades and they have proven profitable.

I find it not only a pleasure but a financial benefit with your firm.

Yours truly,

J. F. McNULTY.

North & Stone, Agents Firemen's Fund Ins. Company.

EVANSTON, WYO., *Dec. 2nd*, '02.

Rialto Grain & Securities Company, St. Louis, Mo.

132 GENTS: Yours Nov. 26th, enclosing draft for $827.80, at hand with advice of $300.00 as *margin* on 15000 bus. May corn and appreciate the way you have managed the business as you did not sell me out as I expected you would, but protected my interest to a good advantage as above proceeds go to show, and thank you for the good judgment in handling the business.

Yours truly,

CHAS. STONE.

A. J. Slater, Dealer in General Merchandise,

SLATERVILLE, N. Y., 11-25-02.

Rialto Grain & Securities Company, St. Louis, Mo.

GENTLEMEN: I have your favor of the 21st, enclosing check $344.11 margin and profit on December corn. My profit of $319.11 on an investment of $25.00 in less than a month is certainly due to the way you have handled the account.

Yours truly,

A. J. SLATER.

FITCHBURG, *Dec, 2nd,* '02.

Rialto Grain & Securities Company,

GENTLEMEN: I am in receipt of your letter dated Nov. 29th, which more than pleased me. I was surprised at such a profit in a month and I am satisfied with May corn investment. If I am right, I have to my credit 3,850 bu. May corn. I leave the whole matter in your hands and make as much as you can out of it. What you do
133 will suit me.

Please excuse this writing for I am not very good at it, I thank you for what you have done for me, and I hope by the first of next May I will be able to buy 3,500 bu. July corn.

Yours truly,

GEO. BEAMEGARD.

Phoenix Insurance Company.

SAUGERTIES, N. Y., 11-24-02.

Rialto Grain & Securities Company, St. Louis, Mo.

GENTLEMEN: I beg to acknowledge receipt of check for $890.45 in full for my account. I want to thank you for your good advice in regard to purchasing this December corn, also the prompt and satisfactory way you have handled my account. I only regret that I did not take your further advice not to withdraw quite so soon, and I would have now acknowledged receipt of a check for $1,490.45. Again thanking you, I am,

Yours truly,

ADAM W. ELIAS.

J. J. Underwood, Dealer in Drugs, Oils, Paints, Varnishes, Brushes, Toilet Articles, Druggists' Sundries.

SHARPSBURG, IA., 11-25-02.

Rialto Grain & Securities Company, St. Louis, Mo., Hugh C. Dennis, Prest.

134 DEAR SIR: You cannot imagine my surprise upon receiving your personal check for this week's profits, makes me completely satisfied that you do business upon a solid basis, and can almost guarantee anyone of profits if they make deposits with you.

Very respectfully,

J. J. UNDERWOOD.

Rialto Grain & Securities Company, St. Louis, Mo.

DEAR SIRS: Yours of the 21st received with check for $103.13 in payment of $25.00 which I entrusted to you Oct. 21st, to buy corn for Dec. which you sold Nov. 21st, with a net profit of $78.13—my check from you today showing same, for which you will please accept my warmest thanks. My only regret is that I did not make a larger investment as per your advice.

Truly yours,

M. W. CARTER.

J. O. Clark, Dentist.

TUSCUMBIA, ALA., 11-24-02.

Rialto Grain & Securities Company, St. Louis, Mo.

GENTLEMEN: Many thanks for the deal. I draw on you today for $206.25 being the $50 I invested and $156.25 net profit made by same, full amount of my credit.

Please honor the draft, I need the money for a few days
135 only, then I will figure with you on a larger scale. With thanks again, I am,

Yours truly,

J. O. CLARK.

J. Valek, Dealer in General Merchandise.

RAVENNA, NEB., 11-24-02.

Rialto Grain & Securities Company, St. Louis, Mo.

GENTLEMEN: I received yours of the 22nd, with check for $54.38, and note that you say you have

The next page contains a picture entitled Auditor's Office.

(Letter continued.)

invested the $105.00 in 3500 bu. of May corn.

Please accept my sincere thanks for the $109.38 you made for me on the $50.00 investment. Had I left you alone as I should have done, you would have made me nearly $300 in the three weeks, but I am satisfied with what you have done. Hoping you will do as well or better with my May corn, again thanking you, I am,

Yours truly,

J. VALEK.

136 W. C. & A. Hawkins, Photographer.

ARAPAHOE, OKLA., *Nov.* 21, 1902.

Mr. H. C. Dennis, St. Louis, Mo.

DEAR SIR: Your letter notifying me of the sale of my Dec. corn received, and to find I had actually doubled my money to a penny in about five days, you cannot imagine my surprise. That beats our

Western ways of making money. Here interest runs from 12 to 24%, but that is not in it with December corn.

You must have misunderstood my letter ordering immediate sale. I meant to say "sell latter part of Nov. 29th or 30th, to avoid any delivery, and rebuy Dec. 2nd or 3rd, to sell about Dec. 30th." I am not in a financial condition to invest any more now, but will likely invest in May corn heavily in a short time. Use the original purchase, together with profits to best advantage, but avoid delivery.

Should I be able to deal heavier, shall risk your judgment in the matter.

Trusting that good luck may continue with us,

Very truly,

W. C. HAWKINS.

137

Corn.

Why is it that we talk, CORN, CORN, CORN? Because we know all about corn, we know the corn market like an open book. We have spent thousand- of dollars learning the exact state of the produce on hand the demand that will be made on it.

Have you ever seriously thought of the demands made on this limited crop? Pick up any newspaper or magazine, see the thousands and hundreds of thousands of dollars now being spent in advertising pure foods and breakfast foods. CORN is the basis of nearly all of these. This great variety of dainty dishes prepared from corn and made to tickle the palate, cultivating a taste for these good things to eat, has increased a hundred fold the table consumption of corn since the days of hominy and cornmeal.

Think of the hundreds of thousands of hogs and cattle fattened in this country for domestic use and foreign export ON CORN.

Corn is used in a hundred different ways. Take, for instance, the Glucose or "Grape Sugar" industry, the exports of this commodity in 1890 were only $850.00, in 1901 they increased to the enormous sum of $3,000,000. In the same period of time our exports of starch jumped from $474,000 to $2,640,000. BOTH CORN PRODUCTS.

'orn Abroad.

Our country has spent thousands of dollars in cultivating the taste for corn in the foreigner. Commissions have been sent abroad, corn dishes have been prepared in all their goodness till the foreign palate has pronounced them delicious, and now American maize (corn) is a table luxury not only in America but in all European countries.

Thus the demand for CORN increases—in fact, in some lines, this demand almost doubles with each year. And where is it all
138 coming from.

If you have been keeping abreast of the times, you will know how alarming the situation is growing. The corn belt is limited; almost the entire available area is now under cultivation. Special commissions have been appointed by the United States Government and by the different States to ascertain what can be done to increase the yield per acre. This information is being acted upon in a limited way, but the increase in supply can in no way keep pace with the ever-increasing consumption.

After all, the corn crop depends upon the season. As the corn belt is not large, climatic conditions are about the same in all its parts. Think how the markets of the world watch this corn belt.

With an ever-increasing population of the globe, with the introduction of corn in more appetizing forms, the demand for this cereal is growing far in excess of the growth of the world's population; and the greatest possible production has almost reached its limit. So keep your eyes on CORN; watch it mount higher and higher in price for May delivery.

## The Present.

But we are running a little ahead of our tale. What are the present prospects?

It is needless to remind you of the drought of 1901 in the Central and Western States. Do you remember the pitiful sight of the fields of burnt corn, making a shortage of full one billion bushels from the average yield of over two billion five hundred Million? Think, when a billion five hundred million bushels can not supply the demand, how could such a shortage be met? People intimate with conditions know how little of one years's crop is carried over to the next year.

139 Last Autumn we heard fabulous reports of bumper crops from all parts of the corn belt. There was a fairly average crop of corn and prices went down low. But these averages were made before the crop was gathered. We had our reports at the same time and knew the true state of this crop. We predicted what the price for corn ought to be. WE WERE RIGHT. Quantities of this corn was exported. It arrived sweaty. IT WAS NOT CONTRACT CORN, it was soft corn, unfit for export and unfit for manufacturing purposes. The continued rains and short season did not give the corn sufficient time to ripen, consequently we are confronted with a short crop of CONTRACT CORN for future delivery.

All corn for export must grade as contract corn. Corn for manufacturing purposes must be contract corn. The corn you see quoted in market reports is contract corn, the corn we buy and sell is contract corn.

So when we got in our complete reports from all parts of the corn belt and averaged up the crop of contract corn—then we knew that the price of corn must advance and advance quickly.

We told the public this last Spring about September and December corn. We tell them the same thing now; BUY MAY CORN. Common sense and your own sound business judgment must tell you that May corn, bought now, will make for you enormous profits within the next sixty days. May corn, will, we believe, reach a price higher than it has touched in twenty years for this option. We respectfully submit the following digest of a few of our customers' trades in December corn. The affidavit as to the correctness of these statements is made by our Assistant Auditor, Mr. W. Arthur Clemes. What we did for our customers in DECEMBER corn may be duplicated many times over by a purchase of MAY corn at its present low price.

| Name. | P. O. address. | Date investment. | Amount. | Check to. Bal. sent. |
|---|---|---|---|---|
| L. Smith | West Point, Ia | Invested Oct. 10th | $200.00 | Check sent 12-3 |
| | | Closed Dec. 3d | 549.22 | $549.22 |
| Leo. F. Hugle | New Rochelle, N. Y | Invested Oct. 21st | 150.00 | |
| | | " Nov. 18th | 100.00 | Check sent 12-3 |
| | | Closed Dec. 3d | 639.37 | $639.07 |
| Ellis C. Richardson | Kilmarnock, Va | Invested Oct. 9th | 200.00 | Check sent 11-28 |
| | | Closed Nov. 18th | 875.00 | $875.00 |
| H. C. Bell | Box 72, Marion, O. | Invested Nov. 5th | 200.00 | Check sent 21-26 |
| | | " Nov. 12th | 100 | $2075.00 |
| | | " Nov. 14th | 200.00 | Check sent 11-29 |
| | | Closed Nov. 21st | 1,600.00 | $525.00 |
| Chas. Stones | Evanston, Wyo | Invested Oct. 11th | 100.00 | Check sent 11-26 |
| $300.00 reinvested in May corn. | | Closed Nov. 17th | 1,127.80 | $827.80 |
| A. M. Keney | Utica, N. Y. | Invested Oct. 23rd | 150.00 | Check sent 11-28 |
| | | Closed Nov. 19th | 564.35 | $654.35 |
| Chas. O. Hirsching | Cleveland, O. | Invested Oct. 23rd. | 30.00 | |
| $100.00 reinvested in May corn | | " Oct. 21st | 150.00 | Check sent 11-25 |
| | | Closed Nov. 20th | 1,020.00 | $920.00 |
| S. L. Miles | Gerry, N. Y. | Invested Oct. 17th | 100.00 | Check sent 11-22 |
| | | " Oct. 27th | 100.00 | |
| | | Closed Nov. 20th | 766.49 | $766.49 |
| W. P. Morgan | Gerry, N. Y | Invested Oct. 17th | 100.00 | Check sent 11-22 |
| | | " Oct. 27th | 100.00 | $766.49 |
| | | Closed Nov. 20th | 766.49 | |
| C. S. Scudder | Huntington, N. Y | Invested Oct. 23rd | 200.00 | Check sent 11-24 |
| | | Closed Nov. 20th. | 850.00 | $850.00 |
| Capt. E. E. Hatch | Whipple Barracks, Prescott, Ariz. | Invested Oct. 22nd | 180.00 | Check sent 11-24 |
| | | Closed Nov. 20th | 766.40 | $766.40 |
| B. S. Brooks | Glade Springs, Va | Invested Oct. 23rd | 250.00 | Check sent 11-20 |
| | | Closed Nov. 20th | 1,083.00 | $1083.00 |
| A. W. Elias | Saugerties, N. Y | Invested Oct. 6th | 100.00 | |
| | | " Oct. 21st | 100.00 | Check sent 11-21 |
| | | Closed Nov. 18th | 890.43 | $890.43 |
| M. J. Higley | Burlington, Ia | Invested Oct. 23rd | 200.00 | Check sent 11-21 |
| $300.00 reinvested. | | Closed Nov. 21st. | 487.50 | $487.50 |
| Elmer Brintnall | Aurora, Ia | Invested Oct. 9th | 100.00 | Check sent 11-21 |
| | | Closed Nov. 17th | 644.56 | $664.56 |
| Geo. G. Wait | Watkins, N. Y | Invested Nov. 5th | 172.00 | Check sent 11-20 |
| | | Closed Nov. 18th | 622.00 | $622.00 |

141 STATE OF MISSOURI, *City of St. Louis:*

W. Arthur Clemes, of lawful age, being duly sworn before me, on his oath says, that he is the Assistant Auditor of and for the Rialto Grain & Securities Company, of the City of St. Louis; that he is familiar with the books of account of said Company, and that he has personally examined the accounts of the aforesaid persons, and that the statements thereof, as above set out, are true.

W. ARTHUR CLEMES.

Subscribed and sworn to before me, this eight day of December, 1902. My term expires January 10th, 1903.

IRWIN WALKER,
*Notary Public in and for the City of St. Louis, Mo.*

The time is ripe for shrewd manipulations. The clever manipulator, ever barking of the bumper crop to lower prices, is QUIETLY BUYING CONTRACT corn for May delivery at a low price. The crop is limited and it will not take long to corner May corn.

We carefully follow all corn operations. We know the members of the syndicate who practically control the corn situation now. The successful speculators of New York, Chicago, and St. Louis are throwing millions into the pit at this time in the PURCHASE of corn for May delivery. These men have millions at their command to carry out their plans.

From sources that are generally conceded as reliable come reports that Armour and his followers at present hold over fifteen million bushels of corn for the May delivery. These shrew speculators, who naturally know the true state of affairs, in addition to these holdings, now own most of the cash corn of the country. Thus they practically have the market cornered, and when they complete
142 their operations they will be able to dictate their own prices.

According to actual statistics, there is far less contract corn in the bins of the manufacturers, and far greater demand for it, than at any corresponding period in the past twenty years. Corn for May delivery will, we believe, sell at 60 cents by April 30th next. We do not think that the reports of the last big crop will affect the present situation. Remember that but a very small part of this crop will grade as contract corn.

There never has been a better opportunity for judicious investment than corn now offers. A purchase made at or near the prevailing prices should treble many times the amount invested.

Now, suppose you should buy 5000 bushels of cash corn, and should hold for May delivery—figure up the three months' storage, the loss incidental to shipping, the shrinkage, the interest on the actual cost of the corn, and you will find that the cost price has increased several cents per bushel. Then why buy CASH CORN when you can make a contract to buy a certain amount of corn at a given time in the future, at a given price? Should the price advance, you may sell your contract and pocket the gain, or you may hold your option and demand delivery of the corn.

In every line of business, by retailers, manufacturers and jobbers, goods are purchased for future delivery at an agreed price. If values increase, they may sell the amount of goods they ordered to another merchant, have the goods delivered to him, and make the difference in price. You do exactly the same thing when you buy corn for future delivery. You contract now for corn at a certain price; corn goes up; you sell your contract; you make the difference.

While you own a contract, you protect it with a portion of the purchase price. This deposit is called "margin" and is usually
143 from one cent to five cents per bushel. Five thousand bushels purchased on a 2c. margin require a deposit of only $100.00; this forms your working capital, and, unless the price should drop below your exhaust price, no more would be necessary to carry your trade up to the day of delivery.

You may ask why we do not buy May corn ourselves if it is such a good thing. We answer you at once that we are buyers on our own account of large quantities of corn for May delivery, and we not only buy for ourselves but for thousands of others.

## Our Special Proposition.

If you have carefully read this book we feel that you must now pretty thoroughly understand the money-making methods of the big speculators; you must also understand the true state of the corn crop; you must see that this is your opportunity to make your money make more money. Do you know of any better investment than May corn offers? If you do, please tell us, as we are looking for just such a snap.

May corn is selling for about 43 cents. We believe it will advance rapidly. Remember, we made a similar prediction last Spring about September Corn. We were right. We were right about December corn, and those of our customers who took our advice and purchased September and December corn and held on to their purchases made many thousands of dollars.

## How Much Corn Can You Buy?

| | |
|---|---|
| $25.00 will buy | 1,250 bushels of corn on a 2c margin. |
| 50.00 will buy | 2,500 bushels of corn on a 2c margin. |
| 100.00 will buy | 5,000 bushels of corn on a 2c margin. |
| 200.00 will buy | 10,000 bushels of corn on a 2c margin. |
| 500.00 will buy | 25,000 bushels of corn on a 2c margin. |
| 1,000.00 will buy | 50,000 bushels of corn on a 2c margin. |

If you could see our offices and plant, you would be thoroughly convinced that the Rialto Grain and Securities Company is especially adopted for serving its customers. Now, as many of you can not visit us, we give in booklet views of our different departments: these may
144 interest you. We know the grain business, and we know it in its minutest detail. We not only know the grain business, but we have made, and are making a specialty of corn. *Some of*

*us have spent a lifetime in the grain pit.* We have spent many thousands of dollars for information and experience in learning the ins and outs of this grain business. Both the Western Union and Postal Telegraph Companies have wires running into our offices, and employ special operators to handle our business. These telegraphic facilities are in addition to our private wires, which reach the trade centers of the United States, and enable us to keep in instant touch with the markets of the world. In this way we get our quotations almost the same instant that they are made on the floor of any important exchange. The advantage of this service to us and to our customers must be apparent to you.

Then, our Company is perfectly organized. Every man, being a specialist, has his own work to do. He is personally responsible for the work he turns out and must do his work perfectly or lose his position. Think of grain and stock dealers employing an office force of over one hundred people—this is what we do, and your small investment is given the watchful attention of this perfect organization. Success in speculation is made through eternal vigilance. By practicing these methods we have built up our enormous business until now we believe we have more customers on our books than any other dealer in grain and stocks in America. You may at all times have the benefit of this service and of our facilities for the asking. We charge nothing for advice; ask, and you will be answered to the best of our ability. Furthermore, when trades are made with us, we endeavor to keep our customers fully informed of the market conditions, and, in the event of a decline below exhaust price, it is policy to wire our customers at once (unless directed to the contrary) that they may at all times be given the opportunity to keep their trades in force. We want you to keep your trade in force; by doing so, you will, in our judgment, surely succeed.

As to the financial standing of the Rialto Grain and Securities Company, we respectfully refer you to the leading Commercial Agencies of the country. We carry large balances in four of the principals banks of St. Louis; our standing in this respect is second to none in America.

### Sales Made Immediately.

All your money, principal and earnings, is subject to instantaneous withdrawal, any day, any hour.

Wire or telegraph, and we wil close your account and send the money due you by telegraph if you desire, or by draft in first mail. Unlike ordinary investments, you have a commodity that you can realize on immediately.

Don't hesitate to investigate our proposition fully; understand that you will not obligate yourself in any way by the desire to know just exactly what we can do for you.

Make all checks, drafts or postal orders payable to

RIALTO GRAIN AND SECURITIES COMPANY.

Bankers.
Fourth National Bank.
Germania Trust Company.
Commonwealth Trust Company.

Special References.
Kastor & Sons Company, St. Louis.
Skinner & Kennedy Company, St. Louis.

Any information you desire as to our Financial Standing will be furnished you by the Barr & Widen Mercantile Agency Co. whose address is 514–516 Commercial Building, St. Louis.

They have made a thorough investigation of our Company, and can give you an intelligent report, free of charge.

146 BLAINE W. TAYLOR a witness of lawful age, being duly produced, sworn and examined in behalf of the United States, testified as follows:

Direct examination.

By Mr. D. P. DYER:

Q. Will you state to the jury your present residence?
A. Elkins, West Virginia.
Q. How long have you lived at Elkins, West Virginia?
A. Since the 20th of August last, a year ago.
Q. Prior to that time, what official position, if any, did you hold in the Post-office Department of the United States?
A. I was Chief Clerk of the Post-office Department.
Q. Will you state to the jury what period your services covered?
A. I do not remember; I don't know that I can state exactly. It was from about 1894 to 1904.
Q. Where did you have your office?
A. In the Post-office Department Building, at Washington, D. C.
Q. Did you as such Chief Clerk receive the letters addressed to the Post-master General?
A. Yes, sir.
Q. Who were the Postmasters General during your service?

The COURT: There is no use covering so long a period. Cover the particular period here involved.

Mr. DYER:

Q. Who was Postmaster General during November and December, 1902 and January, February and March, 1903?

147 A. They were changing Postmasters General rather rapidly about that time. I believe that Mr. Payne was Post-master General; Mr. Smith and Mr. Payne; but I forget the dates now without refreshing my memory.

Mr. LEHMANN: There is no use having any confusion about that matter.

The COURT: My recollection is, it was Mr. Payne. It is a matter of which I could take judicial notice.

Mr. DYER: If it is admitted that Mr. Payne was there from the first of November, 1902 until the first of April, 1903.

Mr. LEHMANN: We will make that admission, subject to correction if it should be a mistake.

Mr. DYER:

Q. What were your duties as Chief Clerk of the Post-office Department at Washington?

The COURT: Do not make your questions so broad as that. You mean to inquire what was his duty with respect to the incoming mail and its distribution, do you not?

Mr. DYER: Yes, sir.

A. My duty was to prepare letters for the Postmaster General, such letters as were properly answered from his immediate office; and such letters as were not answered in his office would be referred to the particular portion of the office for attention and treatment.

Q. I show you a letter of Bella Evans, dated Albany, New York, October 28, 1902, and ask you to look at that letter and the stamps that are *are* on either side of it: Can you tell when that letter was received at the Postoffice Department, if it was received?

A. (After examining letter.) Yes, sir, it was received at the Postoffice Department on November 1, 1902.

148 Q. How do you know?

A. I know from the stamp of the Chief Clerk's office on the back of the letter.

Q. Is that the stamp of the Chief Clerk?

A. (After examining letter.) Yes, sir.

Q. Now you may state what became of the letter when it was received by you?

A. The letter was referred to the Chief Postoffice Inspector.

Q. Who was the Chief Postoffice Inspector at that time?

A. William E. Cochran.

Q. When was it referred to the Postoffice Inspectors, with reference to the time when the same was received by you?

A. It was referred the date of the stamp on the back, November 1, 1902, I believe it is.

Q. For what purpose, if you know, was this letter so referred?

A. It is a letter properly coming before his Division for attention, and it was referred for that purpose.

Q. Will you read what appears in that stamp on the back of the letter? There is something there I cannot read.

A. (Witness reads:) "Postoffice Department, received Nov. 1, 1902, office of the Chief Clerk."

Q. If this letter was accompanied by any other paper, what became of the paper that was with it?

A. It would have been referred with the letter; it would have gone to the Chief Postoffice Inspector, with the letter.

Q. Would there be anything stamped by you, except the letter itself?

149 A. Well, possibly not. It is possible that both the enclosure and the letter were stamped, but they might not be. It is customary, however, to stamp both; but it is frequently omitted.

. If any paper accompanied this letter, or any circular or any-
g of that sort accompanied the letter, at the time you referred
the Chief Post-office Inspector, Mr. Cochran, would that paper
mpany this reference?
. Yes, sir.
. I show you a letter dated Albany, New York, October 30, 1902,
ed Mrs. K. C. Houts, and ask you to look at that letter and tell
jury when that letter was received by the Postoffice Department,
was so received?
. (After examining letter.) That letter was received by the
toffice Department October 31, 1902.
. What was done with it?
. That was referred to the Chief Postoffice Inspector for atten-
.
. Would the same thing apply to that letter, with reference to
ers that might accompany it, as to the former letter about which
have just testified?
. Yes, sir, precisely.
. I show you a letter signed S. A. Warner, Pittsfield, Mass., and
you to look at that letter and state when that was received at the
toffice Department, if it was so received?
. That was received at the Postoffice Department January 16,
3.
. What was done with it?
A. That was referred to the Chief Postoffice Inspector.
Q. If any enclosure accompanied these letters were they sent to the Postoffice Inspector, too?
. That would have been the course, yes, sir.
. I show you now a letter dated New Brighton, Staten Island,
ed Arthur M. Allen: I will get you to look at that letter and state
n that letter was received at the Postoffice Department if it was so
ived?
. That letter was received by the Postoffice Department Decem-
29, 1902.
. What became of it after it was received by you?
. That was referred to the Chief Postoffice Inspector.
. And anything accompanying that letter——
. Would have also been referred to that office.
. That was the regular course?
. Yes, sir, that was the regular course of procedure.
. I show you a letter dated Washington, D. C. November 3, 1902,
ed F. R. Fravel, and ask you to look at it, and state to the jury
n that letter was received at the Postoffice Department, if it was
received?
. That was received at the Post-office Department November 4,
2.
. When was it referred to the Postoffice Inspector, if it was so re-
red?
. It was referred on that date, November 4, 1902.
. And any paper accompanying that would also go to the Post-
ce inspector?

A. Yes, sir.
Q. At the same time the letter itself went?
A. Yes, sir.
Q. After these letters were received at the office of the Chief Inspector of the Postoffice Department, what course they took
151 in the office of the Chief Inspector of the Post office Department, you don't know?
A. No, sir. I could not state positively as to that.
Q. It is not your official duty to look after that?
A. No, sir.

Cross-examination.

By Mr. LEHMANN:

Q. You, Mr. Taylor, simply open and examine the incoming mail?
A. That was one of my duties in the office.
Q. I refer to this matter.
A. Yes, sir.
Q. And you distribute that mail to the various divisions of the Postoffice, according to the subject matter?
A. Yes sir.
Q. As it belongs to one or to the other?
A. Yes, sir.
Q. And that is the end of your function as regards the matter after it has been referred?
A. Usually, yes sir. Of course it may be necessary to on special occasions to follow it up, but not ordinarily.
Q. But so far as this was concerned, you never had any occasion to follow it up.
A. No, sir.

The COURT:

Q. In the receipt, opening and distribution of the mail, you were acting as the representative of whom?
A. The Postmaster General.
Q. The volume of mail is so large that a letter of that kind cannot receive his individual attention?
A. It is impossible.
152 Q. Therefore the custom in respect to that was to delegate it to the Chief Clerk?
A. Yes, sir.

GEORGE M. SMITH a witness of lawful age, being duly produced, sworn and examined in behalf of the United States, testified as follows:

Direct examination.

By Mr. D. P. DYER:

Q. You may state your name in full?
A. George Mich Smith.

Q. Where do you live?
A. Washington, D. C.
Q. What official position, if any, do you hold in Washington?
A. Clerk in the office of the Chief Inspector, Chief Postoffice Inspector.
Q. How long have you been clerk in the office of the Chief Postoffice Inspector?
A. Since the Fall of 1900, I think.
Q. You were there as Clerk in the office of the Chief Postoffice Inspector in November, 1902 and from that up to April 1st, 1903, were you?
A. I was.
Q. Who was Chief Postoffice Inspector between those dates?
A. Mr. William E. Cochran.
Q. Who is the present postoffice inspector in charge?
A. Mr. William J. Vickery.

3 Q. In that office, you may state briefly, what your duties consisted of?

A. The preparation and reference to the filed of cases for investigation by the different Postoffice Inspectors, and also the distribution of the reports of the Inspectors on those cases, after their return to the Department; watching and noting the correspondence incident to these cases; reference to any communications that reached the Department that bore on the keeping of a complete record of them.
Q. When you say "postoffice Inspectors in the field" what do you mean by that?
A. I mean *to* the several Divisions; cases are sent to the several Divisions, to the Inspectors in charge, and he in turn gives them to such Inspectors as may be working under him as he may desire.
Q. What do you mean by "cases"?
Mr. LEHMANN: I submit that is immaterial.
Mr. DYER: I propose to show the exact course of things.

The COURT:

Q. When you speak of "cases" do you use that in the sense of complaints?
A. A complaint or letter, without regard to its foundation, whether well founded or not, if it is a complaint it is regularly jacketed and referred.

Mr. DYER:

Q. How many Divisions are there in the Post Office Department?
The COURT: You mean out in the field?
Mr. DYER: I mean how many Inspectors in Charge.
The COURT: In Washington, or in the field?
Mr. DYER: In the field.

4 Q. How many Inspectors in Charge in the field, as you call it, were there at that time?
A. Sixteen, I think.
Q. Was St. Louis, Missouri, the head of one of those Divisions?

A. Yes sir.

Q. I show you a letter or letters, one of Bella Evans, dated October 28, 1902, and one of Mrs. K. C. Hout——

The COURT: Just name the writers of those letters, and say "as heretofore introduced" and that will save time.

Mr. DYER:

Q. I show you also the letter of Fravel, Arthur M. Allen and S. A. Warner, each and every of which have heretofore been read in this trial, and ask you to examine them and state if you can, by designating from each letter, when each was received in the office of the Chief Postoffice Inspector?

A. The one signed by Warner, I think it is, was received in the office of the Chief Postoffice Inspector on January 17, 1903. It is signed S. A. Warner, I think.

Q. Look at the others.

A. Mr. Allen's letter was received in the office of the Chief Postoffice Inspector December 20, 1902. Mrs. Hout's letter was received November 1, 1902. Mr. Fravel's letter was received November 4, 1902. Bella Evans' letter was received November 3, 1902.

Q. After the receipt of those letters what was done with them?

155 A. The letters, the subject matter of the letter is read, gathered, and the index of the subject matter is searched to see if we have a case pending against the party against whom the complaint is made. If we have a complaint, the number of the case is marked on it, or "No record" is marked on it; or "cannot identify." But if there is a number on it, it is then marked, and the case bearing that number is looked up to see where it is; and if it is not in the Department, it is sent to the case, wherever it may be.

Q. So that every letter, where a case has been made, is included in that particular case, and sent to the Postoffice Inspector?

A. Yes sir.

Q. I show you a paper, or a cover or a jacket, or what not, and ask you to look at it and state what it is?

A. (After examining paper.) This is what we would term in our office the jacket of case No. 13778, jacketed against The Rialto Grain & Securities Company, of St. Louis, Missouri, for alleged fraudulent use of the mails.

Q. Now state when that jacket was made up, if at all, in your office, if you know?

A. Yes, sir, that jacket was prepared in our office right by my side, November 7, 1902.

Q. And what was inclosed in that jacket, if anything, and sent to the Postoffice Inspector in Charge at St. Louis?

A. A complaint of Bella Evans and of Mrs. K. C. Hont, it appears on the jacket. The names are sometimes indistinct, and the stenographer who took the case wrote it as Hont; the complaint of Mrs. K. C. Hont.

156 Q. Did that jacket contain the two letters you have there before you, and from which you have read, whether it is Hout or Hont, and of Mrs. Evans?

A. Yes, sir, those are the two letters.

Q. After the receipt of the other letters you have there before you, what became of those when they came in?

A. They were forwarded to the case, wherever it was, and their record should appear, the action taken by them should be noted, on an exact fac-simile of this. When this jacket was prepared a duplicate of it was made in carbon, and the history and disposal of the subsequent papers, some of them at least, is noted on the carbon of that case—the duplicate: what we call the carbon of the jacket.

Q. Have you with you any record or copy of record from the Post-office Department showing the receipt of these complaints?

A. Showing the disposal of them, yes, sir.

Q. Have you that in your possession?

A. I have.

Q. Will you produce it.

A. Here it is (witness produces paper).

Q. What is this?

A. (After examining paper.) That it the carbon, the duplicate of the jacket of that case against the Rialto Grain & Securities Company.

Q. Does that contain a full list of all the complaints made against the Rialto Grain & Securities Company that were docketed by that number, and sent to the Postoffice Inspector at St. Louis?

A. I cannot say whether it contains all of them or not.

157 Sometimes they are sent, where numerous——

Mr. LEHMANN: I think that should be limited to what was done in that case.

(Mr. DYER, resuming):

Q. I don't care what was done in other cases. But, as far as you know, this paper contains the different complaints sent to the Post office Inspector at St. Louis, under the number you have given?

A. Yes sir, through our office.

Q. Is there a number made upon the records of your office of each and every person or corporation against whom a complaint is made?

A. Yes, sir, if a case is jacketed against them, there is.

Q. Look at this paper and see whether the papers, other than the Houts and Evans letters, are entered upon that paper?

A. (After examining paper.) Yes, sir, quite a number of them.

Q. The letters I have shown you, are embraced in that?

A. Yes, sir.

Q. Did each and every one of these letters—the complaints that are mentioned on the back of this paper, bear the same number that the original jacket bore when the Houts and Evans complaints were sent in?

A. Yes, sir.

Mr. DYER: I offer this in this connection now, and ask to read it

The COURT: Better state you offer the duplicate jacket just identified by the witness.

Mr. DYER: It is the office record of this particular jacket, I take

it. But, that there may be no mistake, about it, I will offer
158 both, the jacket that was first identified by the witness, together with the duplicate, or the additions to the original.

Mr. DYER:

Q. The paper I just showed you is the office jacket, containing the names of all, including the Houts and Evans complaints?
A. Yes, sir.

Mr. DYER:

Q. Look at the paper marked "miscellaneous" Case No. 13778 C, and I will ask you what that is?
A. That is the jacket of the case, made in the Postoffice Department office of the Chief Inspector against the Rialto Grain & Securities Company, for alleged fraudulent use of the mails.
Q. And that was sent where?
A. Sent to the St. Louis Division, to Mr. Rice.
The COURT: Do you call that the original jacket?
159 A. That is the original jacket.

Mr. DYER (resuming):

Q. Now I show you another paper, marked "Miscellaneous Case No. 13778C, of the Chief Post-Office Inspector, and ask you what paper that is, and where it has been since?
A. That is known as a carbon jacket. At the time the jacket was made and this was made, they were duplicates. This (referring to the duplicate jacket) was retained in the files of the Department, for the noting of additional correspondence, and keeping thereon a history of the case. What communications might have been sent to it, when it was returned, when the original came back, noting of correspondence in reference to the case; reference of additional complaints; the notice of any arrest; and the connection of any other cases that might be considered to be connected, intimately connected with it. This carbon should show a complete history of the case, when it is completed.

Mr. DYER: I offer in evidence the original paper, designated as Case 13778C.

And I offer this duplicate or carbon of the same paper, together with whatever additions have been added to it.
The COURT: Is there objection?
Mr. LEHMANN: There is none.
The COURT: Let them both be read in evidence.
Counsel for the Government here reads to the jury the papers above referred to, being the original and duplicate of jacket of case No. 13778C.

Which papers are in the words and figures following, to-wit:

160

(Original.)

Miscellaneous.

Case No. 13778C

Chief Post Office

Inspector.

(Class office)

1

Office St. Louis
County
State Mo.
Subject: Alleged fraudulent scheme.
Complaint Bella Evans.
Mrs. K. C. Hont
Address 856 3rd St., Albany, N. Y.
Date Oct. 30–02.
Vio. of Sec. 1617
By Rialto Grain & Security Co
Address St. Louis, Mo.

WASHINGTON, D. C., *Nov.* 7, '02.

Respectfully referred to (Post) Post Office Inspector in charge at St. Louis for investigation and report.

W. E. COCHRAN,
*Chief Inspector.*

Date returned.....
Date closed.....
Papers and report Inspector.....
Referred to.....

Reference.

S

161

Papers and Reports of

Inspector.....

Sent to.....

O

.....

.....

.....

(Carbon Duplicate)

P. L. R. R. of 1902.

Miscellaneous.

Case No 13778 C.

Chief Post Office Inspector.

| | | (Class office) |
|---|---|---|
| Office | St. Louis | 1 |
| County | | |
| State | Mo. | |
| | Alleged fraudulent scheme. | |
| Complaint | Bella Evans | |
| | Mrs. K. C. Hont | |
| Address | 856 Third St. | |
| | Albany, N. Y. | |
| Date | Oct. 30–02. | |
| Vio. of Sec. | 1617 | |
| By | | |
| | Rialto Grain & Security Co. | |
| Address | St. Louis, Mo. | |

WASHINGTON, D. C., *Nov.* 7–'02.

Respectfully referred to Post Office Inspector in Charge at St. Louis, for investigation and report.

W. E. COCHRAN,
*Chief Inspector.*

(Stamped on the back is the following) P. O. Department received Oct. 3, 1902. Office of the Chief Clerk.

162 Instructions to P. O. Inspectors.

1. Upon receipt of this case the inspector will enter upon its investigation, either personally or by letter, and as soon as possible will return it to the Department, with the result properly reported, together with all papers relating to it.

2. Inspectors will render their reports, in each case, in the form of a letter, and not indorse them upon the jacket.

3. Inspectors are not allowed to transfer cases sent to them for investigation without special instructions or permission from the Department.

4. Inspectors are expected to avail themselves of the opp-rtunities afforded them, in visiting Post Offices in their respective districts, to impress upon Postmasters the importance of reporting promptly to the Chief Inspector every complaint of loss by mail of letters or parcels, whether registered or unregistered, made to them or coming to their knowledge.—Sections 668, 669 and 670. Regulations 1893 and Sections 278 & 279 & 505 and 1565.

Correspondence.

Complaint of F. R. Fravel, Washington, D. C. sent Inspector Dice Nov. 8/02.

Complaint of Arthur M. Allen, New Brighton, N. Y. sent Inspr. Dice Jan'y 5/03.

Complaint of S. A. Warner, Pittsfield, Mass., sent Inspr. Dice, Jan'y 21/03.

Complaint of E. Oulette, Stafford Sprgs. Conn., sent Inspr. Dice Jan'y 28/03.

Complaint Hon. Jesse A. Frye, U. S. Att'y Washington sent Inspr. Dice M'ch 10/03.

Complaint of F. P. Andrews, Coden, Ala. sent Inspr. Dice M'ch 20/03.

163 Complaint of Joseph Steiner, Washington, D. C., sent Inspr. Dice May 7/03.

Complaint of Joseph Steiner, Washington, D. C., sent Inspr. Dice May 19/03, also that of Mary E. Phillips, Fairhaven, Wash.

Complaint of M. I. Christensen, New York, N. Y. sent Inspr. Dice June 23/03.

Complaint of Dr. Talbot Reed, Atlantic City, N. J., sent Inspr. Dice July 2/03.

Complaint of Bro. John Ellis, Collingswood, O., sent Inspr. Dice July 2/03.

Complaint of John Ellis, Collingswood, O., sent Inspr. Dice July 11/03.

Complaint of F. A. Lawton, Shirley, Mass., sent Inspr Dice July 11/03

Complaint of Dr. D. C. Davies, Pasadena, Calif., sent Inspr. Dice July 11/03.

Complaint of Frank Myers, Miller, S. D., sent Inspr. Dice July 21/03.

Complaint of Jno. K. McDonald, Leadville, Colo., sent Inspr. Dice Aug. 4/03.

Complaint of Jno. J. Nelms, Petersburg, Va., sent Inspr. Dice Aug. 25/03.

Complaint of Clayton S. Titus, Petersburg, Va., sent Inspr. Dice Sept. 3/03.

Complaint of Jno. J. Nelms, Petersburg, Va. sent Inspr. Dice Sept. 12/03.

Complaint of D. J. Prescott, St. Albans, Vt., sent Inspr. Dice Sept. 12/03.

Complaint of John J. Nelms, Petersburg, Va., sent Inspr. Dice Sept. 29/03.

Complaint of H. S. Magraw, Sheridan, Mont., sent Inspr. Dice Sept. 29/03. (Sept. 22)

Complaint of Jno. J. Nelms, Petersburg, Va., sent Inspr. Dice Oct. 3/03.

Complaint of Chr. Frau, Alameda, Calif., sent Inspr. Dice Nov. 5/03.

164 Complaint of J. S. Hamilton, Roaring Springs, Pa., sent Inspr. Dice Feb. 16/04.

Complaint of Forbes Claxton, Paterson, N. J., sent Inspr. Dice 4-29-4.

See letter of Chief P. O. Inspector dated July 29, 1905 to R. M. Fulton.

Request for report.

Reference.

Special report of Inspector Dice dated Aug. 29, 1903, sent Ass't Att'y. G ( ) Sept. 2, 1903.

Special report of inspectors Price and Piatt dated Aug. 20, 1903, sent Ass't Att'y. G ( ) Sept. 2, 1903.

The above noted special reports—with accompanying papers—and letter from Ass't Att'y Gen'l of Sept. 9 03 sent Inspr. Dice Sept. 10 03.

Special report of Inspector Piatt Dated Jan. 9 04, in case No. 13,778 C filed in Bureau of Identification, History No. 6357. Subject, Arrest W. D. Mahaney, A. D. Hardie, H. C. McRae & indictment of Hugh C. Dennis.

165 The COURT: What is the purpose for which you have made reference to the endorsements made after March 26, 1903?

Mr. DYER: I had to offer the whole paper. Complaints made after that time had no particular bearing upon it. I offered the whole paper, and the whole paper was read, showing the different complaints.

I want to ask this witness one other question:

Q. Whether or not this case was pen-ing in the Department and before the Postoffice Inspectors, from the time, November 7, 1902, up to the 26th of March, 1903?

A. It was.

Q. Had it at that time been disposed of?

A. No, sir, it had not been disposed of.

Q. It was still pending before the Department, and with the Postoffice Inspectors?

A. Yes, sir.

Q. Had any of these complaints, of the complaints I read, and that you saw, from Fravel, Evans, Houts and Allen, been returned to Washington prior to the 1st of April, 1903, by the Postoffice Inspector?

A. They had not.

The COURT: The various endorsements made upon this duplicate or carbon jacket, retained in the Postoffice Department, which were made after the 26th day of March, 1903, are not in this case; that is, they cannot be considered at all, in any way and they are therefore, withdrawn from the jury.

To which ruling the defendant by his counsel, then and there, by his counsel, duly excepted.

66 Cross-examination.

By Mr. LEHMANN:

Q. Mr. Smith, the paper which I now hand you, and which has ndorsements in lead pencil upon the back of it, is what you call the riginal jacket, and the one that was sent out to the local inspector ere?

A. (After examining paper) It is.

Q. And the other paper, which had a slip attached to it, "Special eport of Inspector Piatt," is the carbon copy that was retained in the Department at Washington?

A. (After examining paper) It is.

Q. Who, in fact, made up these two papers, the jacket and the arbon copy?

A. May I see the jacket? I may be able to tell you.

Q. Yes. What I have in mind is, did you yourself make it?

A. (After examining jacket) I did not. Nor can I tell at this me who it was, who the stenographer was.

Q. At the time that the jacket was sent to Inspector Dice, it con- ained simply the letters of Bella Evans and Mrs. K. C. Houts?

A. I cannot—all I can say is, it contained those two. It might ave contained some other papers. It might have contained the ad- ertisements, or advertising matter that was submitted by them.

Q. Oh, anything that would accompany and was a part of those tters, would be included?

A. Yes, sir, and it might have included other complaints.

—. The carbon copy of the jacket, as you retained it, con- 67 tained only the endorsement of the Bella Evans and the K. C. Houts letters?

A. That is right.

Q. I call your attention to the endorsement upon the copy re- ained at Washington "Respectfully referred to Post-Office Inspector charge at St. Louis for investigation and report, November 7, 902." That indicates it was sent out on that date, does it not?

A. (After examining paper) Yes, sir it does.

Q. Then the first endorsements, additional, which I assume to be e first because it is at the top of the column, and appears first in rder, is the complaint of Fravel of Washington, D. C., sent Inspector ice November 8, 1902. So that did not go in the jacket, but went a separate communication?

A. The following day.

Q. When these letters were sent, which were not contained in the riginal jacket, was any communication of any kind sent with them?

A. A reference slip, with the original case number, the number of at jacket you have in your hand, should have been pasted on or at- ached to these communications, or upon them, inviting attention to e fact that they were for use in a case of that number, giving the umber of that jacket.

Q. You speak of a reference slip: Is that a printed form that is sed in the Department?

A. Yes, sir.

Q. Have you such a form with you?
A. Here is one (witness here produces slip).
Q. The paper sent out with these additional letters as they
168 came in, is like that attached to the letter of S. A. Warner?
A. (After examining paper.) I think that is the letter—yes, sir, that is correct.

Mr. LEHMANN: I will read this slip attached to the letter of S. A. Warner.

Counsel here reads the slip, which is in the words and figures following, to-wit:

"Case No. 13778 C.

Postoffice Department, Office Fourth Assistant Postmaster General. Division of Postoffice Inspectors and Mail Depredations. Washington, D. C.

JANUARY 21, 1903.

Respectfully referred to Post-office Inspector in Charge St. Louis, Mo.

W. E. COCHRAN,
*Chief Inspector.*"

Q. Is that signature of W. E. Cochran a written one or is that stamped?
A. That is a stamped signature.
Q. So it does not necessarily signify that he himself signed that?
A. No, sir, it does not.
Q. Now is this case still pending, and not closed up, in the Department?
A. That was its condition when I left the Department on Saturday.
Q. And the statement that it is still pending, means that is has neither been dismissed nor a fraud order issued?
A. I cannot say as to that. I am not positive as to the fraud order part of it, nor as to the case having been dismissed. I know
169 the case is open on our record awaiting the receipt of a final report from the Inspector.
Q. If a fraud order had been issued, would it be noted upon this carbon copy of the jacket, which is retained at Washington?
A. If proper action had been taken, that is, if the proper form of instruction had been complied with, a fraud order would be noted thereon, provided one had been issued.
Q. I say, provided one had been issued, it would be noted on here as part of the history of the case?
A. Yes sir.
Q. This jacket is intended to be a sort of index of the case, isn't it?
A. No sir, a history of the case—or an index of it, yes sir.
Q. And index of the history, rather than the history itself, isn't it?
A. Yes sir, that is better.
Q. For example, here are these various letters, notations here of when each one was sent out, and then a notation here also, "Special Report of Inspector Dice, dated August 29, 1903."

The COURT: As I understood the statements of counsel to the jury, the claimed service of the defendant terminated in March, 1903, when it is claimed that some money was paid here in St. Louis to him; and that that is the last transaction here under investigation.

Now anything occurring subsequently to that, in the way of
170 additions to the proceeding in Washington, or what not, is immaterial.

Mr. LEHMANN: I would like the Court to consider my suggestion in that regard, if the Court will.

The COURT: You may make it now.

Mr. LEHMANN: My view is this: the charge in the indictment, in both series of counts, but particularly this would have reference to the second series for "receiving." The first series, of course, state what services were to be rendered, which may be more or less conjectural. But the second series, which states what services were, are necessarily defined, of course, because it relates to a past transaction and not with reference to a future intention. I refer to that for that reason, because of the greater definiteness in that.

Now the charge in the indictment is explicit, that this defendant actually induced the Postmaster General to believe that no fraud order should issue, and to refrain from issuing one. The action which was had in this case, the fact that there was no fraud order ever issued in it, is attributed to the inte-ference of this defendant.

I wish to show, which I think is competent, as bearing upon what has influenced the action of the Postmaster G-neral, the history of this case, to show that the recommendations upon which he acted, and upon which the Department acted, came from the officials of the Government who had this case in charge. And it seems to me to be of the most direct relevancy; otherwise we will be met, as we have been met before, with the suggestion that it was easy to see why this company was permitted to run on.

171 Now if we find that there was a definite, thorough investigation made here, and the report of the investigation made back to the Postmaster General, accompanied with the recommendation of the District Attorney of the United States, and accompanied with the recommendation of the Assistant Attorney General of the United States, to the effect that no fraud order should issue, it seems to me to meet directly the charge of the indictment, that the withholding of the fraud order was due to the interference of this defendant.

172 This case comes here, as it has come before, with the suggestion, which we are entitled to meet, I submit, by showing the full course of conduct in this case. We are held here to evidence which has been brought in here, which has been read to the jury. I don't care how its purpose may be theoretically limited, but I venture to say it will not be shown the defendant had any knowledge. We are entitled, if that goes in as a part of the record in this case, if it was proper to go further than to show this mere jacket, of which the defendant may be charged, and properly charged, with knowledge. If it was proper to go in and show the contents of that jacket, then it is proper to show its entire contents; and particularly as the charge

here stands, and unexplained must stand, that the defendant prevented the issuance of a fraud order, and, none having been issued to this day, it was his influence that was operative to that end. I wish to show that trusted officers of the government advised the Postmaster General that there was no occasion for the issuance of a fraud order, upon the reports of Inspectors who are still in the trust and confidence of the government. I submit it bears directly upon the action of the defendant; it bears directly (and we are dealing here with narrow margins) on whether there was any effect to be apprehended, or any good to flow, or did flow. We have that to deal with here, whether it did flow from what was done by
173 him; because the charge is not simply as in the first, that he rendered services, with a view of and for a certain purpose; but that he rendered service sufficient to accomplish his purpose.

I submit it is competent for us to show what influences were bearing upon the mind of the Postmaster General, and which were calculated to bring about "a belief." And I submit that what we offer to show here is much more competent to produce "belief" than anything suggested in the indictment as having brought it about. Because the indictment absolutely excludes a sinister quality of the Postmaster General's action. It does not impute disregard for his official oath. It does not impute corruption to the Postmaster General. And we have a right to assume, and it is our duty to assume, upon the very allegations of this indictment, that he acted in a belief that was honest upon his part, induced in some way, and charged now to the interference of this defendant. The mere knowledge to be brought about by the recommendation of officers who were charged by the obligation of their office, with the duty of recommendation in this respect. It is not pretended that there was any interference by the defendant with the District Attorney. We will show, too, that the recommendation I have referred to was
174 not made by the Assistant Attorney General, who is referred to in the indictment. There will be no pretence that the defendant in respect of that matter ever appeared before the assistant Attorney General, the particular one I referred to, in the offer of what I wished to show.

Mr. Robb: No report, according to the statement of counsel, was made until a time subsequent to the period covered in this indictment. The only fact I wish to state—the considerations that may have induced the Postmaster General during the period covered in this indictment, not to issue a fraud order against the Rialto Grain & Securities Company, may have been entirely different and distinct from the considerations that impelled him either to issue a fraud order or not to do so, subsequent to that period.

So, supposing the company went out of existence, or that having a knowledge of what the Department would require them to do, subsequent to the period covered by this indictment, they conformed to the law? Then on that state of facts the Postmaster General certainly would not have issued a fraud order.

The point I wish to make is, that what transpired subsequent to

the period stated in this indictment, is not material in this inquiry.

175 Mr. LEHMANN: In order to make the record clear, I desire to state my purpose.

I wish to cross-examine the witness with respect to the entries under the printed head of reference on the carbon copy of the jacket, which is retained at Washington, referring to a special report of Inspector Dice, dated August 29, 1903, Assistant Attorney General's report, September 2nd, 1903, Special Report of Inspectors Price and Piatt, August 20th, 1903, sent to the Assistant Attorney General September 2nd, 1903.

The COURT: If the purpose of the cross-examination is to show that the dates of these endorsements are not correct, and that, in fact, the Action in respect of which the endorsements were made was had or taken, on or before March 26, 1903, you may then proceed with the cross-examination. But if the purpose is to call out matters which occurred subsequently to March 26, 1903, and which, therefore, could not have been before the Post Office Department on or before March 26, 1903, then the request for cross-examination is denied, and an exception is allowed.

Mr. LEHMANN: I am assuming, of course, that the dates here are correct.

To the above ruling of the Court the defendant, by his——

176 GEORGE M. SMITH.

Cross-examination (continued).

Mr. LEHMANN:

Q. Mr. Smith you were speaking about those letters coming into the office of the Chief Post Office Inspector and then being sent out to the Field. Would that be done without submitting them to the Chief Inspector personally?

A. Unless there was something extraordinary, something out of the usual line, a letter which I would deem of unusual importance—I would submit a letter of that kind to the Inspector—but ordinarily they are sent without calling the attention of the Inspector to them.

Q. Mr. Smith, are you, or were you at the time involved in this matter, the official in charge who would send out the letter; that is, are you the individual who did it?

A. It was done under me, sir, we have five or six, or seven clerks that constitute the force in that section, and I am in charge of them.

Q. Well it would be done by your direction then?

A. Yes sir.

Q. That is what I had in mind—there is more of it than you alone could do—I took it that you had five or six clerks under you?

A. Yes sir.

177 Q. Now do you re-call whether, in the particular case that we are inquiring about, the complaint of Bella Evans, and Mrs. K. C. Hout, whether they were referred to the Chief Post Office Inspector, or just handled in the routine of your office?

A. I think in the routine. I don't remember. I have no recollection of calling these to the Chief's attention.

Q. But your best recollection would be then, I take it, that they were not submitted to him?

A. So far as I know.

Q. And that is equally true of the letters which followed the letters of Bella Evans and Mrs. K. C. Hout, which referred to those that are noted upon the jacket?

A. I think so, I think that was the way.

Q. So that this matter did not necessarily come to the personal knowledge of the Chief Post Office Inspector at all?

A. Not so far as I know.

Q. Now then, these letters of Bella Evans and Mrs. K. C. Hout, having been sent here, and also the letters which followed these up to, say, March the twenty-sixth 1903; was there any communication during that period between your office and the Inspector's or the Inspector in charge of the division with respect to this matter except that formal printed communication which went out, I presume, with each letter which you sent?

A. I think there was not.

Q. And was there any communication back from the Inspector in charge of the division to your office?

A. Not so far as I know.

Q. Would not any such communication have been noted by you, or by your direction—I don't mean to confine myself to you individually——

A. (Interrupting.) I understand.

178 Q. (Continuing): Would not such communication been noted by you upon the carbon copy of the jacket that was retained by you at Washington?

A. Had it come in the regular channels, the regular course, it would.

Q. Yes, and you have no independent, personal recollection that any communication was received from the Inspector in charge during the period that I am inquiring about, namely, from November to March twenty-sixth?

A. I have none.

Q. Now, a communication between your office and the local Field here, would be, would it not, with the Inspector in charge—it would not be with the men operating in the Field?

A. With the Inspector in charge, it would be addressed to him, yes sir, if in the regular channel, in the ordinary course.

Q. In other words to take the particular case, the particular field was, I believe, at that time—Mr. Dice was the Inspector in charge of the division?

A. Yes sir.

Q. And he had various Inspectors under his direction?

A. Yes sir.

Q. Now, any communications that was desired to be made from here to Washington, it began with the Inspector in the Field, he would report to Dice, and Dice would report to you, is that the way?

A. He would report to the Chief Inspector.
Q. Well "by you" I mean your office.
A. Yes, through our office.
Q. The office of the Chief Inspector?
A. Yes sir.
Q. And any communication of that kind would be noted upon the carbon copy of the jacket retained by you?
A. I think so.
179 Q. And you know of no such communication during the period that I have mentioned?
A. I know of none.
Q. And you know of no communication going out from Washington to Mr. Dice, except of the formal character that has been identified and introduced in evidence?
A. None went through our office.
The COURT: Was there a number of clerks and employees in the Chief Post Office Inspector's Office?
A. A number.
The COURT: Yes.
A. Quite a number, a large number.
The COURT: Were they sub-divided so that the office was committed in part to some, and part of it to others?
A. Yes, the part that belonged to me—I had three classes. The class of cases are known by, distinguished by letters, cases A, B, C, F, R, and S, also I, those letters and three of those classes fell within my action.

The COURT: Was that called a sub-division or a section?

A. Yes sir, a section. Mine is the "Miscellaneous Section" one is the "Foreign Section" known as the "Foreign Section;" another is the "B Section;" another is the "A Section."

The COURT: Then the employees in your section work under your immediate supervision and direction, but they all worked under the general supervision and direction of the Chief Post Office Inspector?

A. Under the Chief Clerk—he being under the Chief Inspector.

180 Redirect examination.

Mr. DYER:

Q. You mean the Chief Clerk of that Bureau—of your office?
A. Yes, the Chief Post Office Inspector.
Q. The Post Office Inspector was the one that gave directions, when any directions were needed to all?
A. To all.
Q. He was the head man?
A. Yes sir.

FRANK E. DAVIS, being duly sworn, testifies as follows on the part of the Government:

Direct examination.

Mr. DYER:

Q. State your full name?
A. Frank E. Davis.
Q. And your position?
A. Chief Clerk to the Inspector in charge of this division.
Q. And were you such Clerk in November 1902?
A. Not Chief Clerk at that time.
Q. Were you a clerk at that time?
A. Yes sir.
Q. In the Inspector's Office here?
A. In the Inspector's Office.
Q. I show you paper marked, or headed, "Miscellaneous, case number 13778-C" heretofore offered in evidence, and I will ask you to look at that paper, and, if you can, tell when that paper was received at the office of the Post Office Inspector in charge at St. Louis?
A. That case was received here on the ninth or tenth of November, 1902.

181 Q. Why do you say the ninth or tenth?
A. Why it was entered on the record of our office on the tenth, which was Monday, but was likely received here on the ninth.
Q. Well, was Monday the tenth?
A. Monday was the tenth.
Q. It may have been received here on Sunday?
A. On Sunday.
Q. And entered on the records of your office on the tenth day of November 1902?
A. Yes sir.
Q. By whom was it entered?
A. By myself.
Q. You entered it yourself?
A. Yes sir.

Cross-examination waived.

M. G. PRICE, being duly sworn, testifies as follows, on the part of the Government:

Direct examination.

Mr. DYER:

Q. State your name in full?
A. M. G. Price.
Q. What official position, if any, do you hold?
A. Post Office Inspector.
Q. Were you Post Office Inspector in November 1902 in this division?
A. I was.
Q. Who was Post Office Inspector in charge at that time?

A. George A. Dice.
Q. He is now dead?
A. Yes sir.
Q. I show you a paper heretofore offered and read in evidence, headed "Miscellaneous, Case Number 13778," and will ask
182 you to look at that and the enclosures therein, and state when, if at all, that paper came to your possession?
A. This paper was given to me on November Fourteenth, 1902.
Q. Where were you when this was given to you?
A. By the Inspector in charge, Mr. Dice.
Q. For what purpose, state it?
A. For investigation of the Rialto Grain and Securities Company on the charge of an alleged fraudulent scheme.
Q. I will get you to state if you went to the Rialto Grain and Securities Company, after you received that paper, on the fourteenth day of November, 1902?
A. I did, on November the fourteenth, yes sir.
Q. Did you take the papers with you at that time?
A. Yes sir.
Q. Were there any other papers, to your knowledge, inside of that jacket, at that time?
A. No sir.
Q. Did you speak to any one at the Company's office with reference to those papers?
A. Yes sir, I—my impression and recollection is it was Mr. Harlan, who was Counsel and Attorney for the Company, I directed my inquiry with reference to the two complaints that this jacket contained.
Q. Was that inquiry made of Mr. Harlan, Thomas B. Harlan, on the fourteenth day of November, 1902?
A. Yes sir, that is my notation here (indicating).

Cross-examination.

Mr. LEHMANN:

Q. Did you report the result of that inquiry, Mr. Price, to Mr. Dice?
183 COUNSEL FOR PLAINTIFF: We object to that, it does not grow out of examination in chief.
COUNSEL FOR DEFENDANT: I submit it is closely connected therewith, and that I should be allowed to cross examine. I think I have the right to ask whether he reported that fact to any one.
The COURT: Do you ask that with a view to determining whether or not he did, in fact, make any inquiry?
COUNSEL FOR DEFENDANT: I want to ask it for every purpose in the case.
The COURT: You may answer that question categorically yes or no, if you can.
A. Yes.
Q. What did you report to Mr. Dice?
COUNSEL FOR THE GOVERNMENT: That is objected to.

The COURT: The objection will be sustained.

To which ruling of the Court Defendant, by Counsel, then and there duly accepted.

The COURT: It may be that you will be entitled to know what that is later on, but if so, you will be required to make this witness your own witness for that purpose. That is the purport of the present ruling.

Q. This paper that has been referred to by Mr. Dyer, is what has been previously spoken of as the "Original Jacket" sent out from Washington, and I observe upon the back of it, and at the top, written in lead pencil, your last name "Price," is that in your hand writing, or do you know?

A. I—No sir, that is not my hand writing.

Q. That is probably Mr. Dice's?

184 A. That is probably one of the Clerk's who assigned that case to me.

Q. Or one of the Clerk's?

A. Yes sir. The date shown at the top of it—did you speak of that also.

Q. I didn't, but let me see—yes?

A. That is in my hand writing.

Q. That is yours, and from that "11-14-02" I take it it means November the fourteenth 1902?

A. That is correct.

Q. And that is a notation made at the time from which you are able to identify when it came—or fix definitely when it came into your hands?

A. Yes sir.

Q. Now, this jacket contained simply the letters of Bella Evans and Mrs. K. C. Hout?

A. Yes sir.

Q. As I understood you to say?

A. Yes sir.

Q. Now, referring to the letter of Mrs. Bella Evans, I notice upon the back of that some pencil notations. Are you able to state in whose hand writing they are?

A. Yes sir, that is my hand writing.

Q. Now, the first notation apparently being at the top, and to the left, is "October twenty-eighth '02" then there is "November"—you will have to help me out about that. The paper has been torn away in part?

A. Well the first line is October twenty-eighth, 1902—it appears to be November first to fifth. November one and a dash and the figure five.

Q. And that follows——

A. (Interrupting.) This came to me from November first to the fifth.

Q. Then, below, a second line "October sixteenth" and "Bot. fifteen hundred corn thirty dollars" and below that again "Re-

185 plied three times" what do those notations upon that letter mean?

COUNSEL FOR THE GOVERNMENT: We object to that as not growing out of examination in chief.

COUNSEL FOR DEFENDANT: I think it would have a bearing. I don't mean to say that I asked for anything less than all the purposes of the case.

The COURT: The objection will be sustained.

To which ruling of the Court Defendant, by Counsel, then and there duly *accepted*.

Q. The letter of Mrs. K. C. Hout, referred to, I find has upon the back certain notation- in pencil, and I will ask you in whose hand writing they are?

COUNSEL FOR THE GOVERNMENT: That is objected to on the same ground, that it does not grow out of examination in chief.

The COURT: I think that may be answered.

A. These notations are in my hand writing.

Q. Now, let me see if I read them right. The top is "October sixteenth" in a line by itself. Then there is "Bot." please tell me whether—what next figure is. Is that twenty-five hundred?

A. Well I take it to be twenty-five hundred.

Q. I think that is it "Bot. twenty-five hundred Dec. Corn" That is an abbreviation for December corn, is it?

A. Yes sir.

Q. "Fifty dollars" then "October twentieth, sold, profit, sixty-two fifty" then the line below "Bot. fifty-six hundred a hundred and twelve fifty October twenty-one" You will have to identify that for me, Mr. Price (indicating)

186 A. I can't explain that "Ex." that is what I intended it for probably, it probably meant explanation offered by letter.

The COURT: He is not asking you to explain it.

Q. He is only trying to interpret the chirography. That is all my question calls for. I think that is reading it right. "Offered by letter to protect trade" is not that what it says?

A. Those are the following words.

Q. And then below that again "Replied, November first, October twenty-eighth" that is your writing?

A. Yes, I recollect that.

Q. Now can you tell me when you made the memoranda on these letters of Evans and Hout?

A. November fourteenth 1902.

Q. Were they contemporaneous with your examination?

A. They were the preliminary papers of the examination, rather, my action, this was my preliminary effort in that line.

Q. When next did you go to the Rialto Grain and Securities Company to examine them?

COUNSEL FOR THE GOVERNMENT: I object to that as not growing out of examination in chief.

The COURT: I don't remember that the witness told of any other visit.

Q. I will change my question. Did you again go to the Rialto Grain and Securities Company to make an investigation?

A. I have no distinct recollection of any particular date that I went there, but, I went there afterwards.

Q. Well, was it in July?

COUNSEL FOR THE GOVERNMENT: I object to that. It does not grow out of examination in chief.

187 THE COURT: The objection will be sustained.

To which ruling of the Court Defendant, by Counsel, then and there duly *accepted*.

Q. Do you remember making any examination with respect to any complaint by a Mr. Fravel?

COUNSEL FOR THE GOVERNMENT: We object to that. I asked him nothing about Mr. Fravel.

THE COURT: The objection will be sustained. The Cross Examination must be confined to the matters brought out, or inquired of, in the examination in chief. Exceptions will be saved.

WILLIAM E. COCHRAN, being duly sworn, testifies as follows on the part of the Government:

Direct examination.

Mr. DYER:

Q. Your name *if* William*s* E. Cochran?

A. Yes sir.

Q. Your present residence is what and where?

A. Washington, D. C. District of Columbia.

Q. What official position, if any, did you hold in the Post Office Department from November first 1902 to the Twenty-sixth day of March 1903?

A. I was the Chief Post Office Inspector.

Q. Will you state, Mr. Cochran, where the office of the Chief Post Office Inspector, at that time, was located at Washington?

A. It was in the Post Office Department Building on the

188 fourth floor.

Q. I desire to present to you certain letters that have been heretofore referred to and read in evidence and will ask you to look at them with a view of saying, stating, what course those letters took in your Department after they were received there—if they were received there by your knowledge—and whether there is anything on them that indicates your knowledge of it?

A. The dating stamp shows that one was received—the first one—November 1902; that is the one signed by Mrs. K. C. Hout. The other one signed *my* Bella Evans was received on November third 1902.

Q. Now what was the course pursued with reference to those two letters?

A. Do you wish me to state the practice of the Department, or my recollection in regard to it.

Q. Well the course of the Department, what the course of the Department was with reference to such matters as that?

COUNSEL FOR DEFENDANT: That I submit was shown, and is shown, by their regulations. I don't see that this witness could add anything to that. It has been testified that they were sent out here and that that was the actual course, and that must be determined in this case. Mr. Smith testified that they were sent out here and Mr. Price and Mr. Davis testified they were received here.

THE COURT: I think this matter has already been gone into, and you need not ask this witness that question unless you have some particular reason for doing it.

COUNSEL FOR THE GOVERNMENT: I do not desire to repeat
189 or have this witness repeat what is already in evidence before. I wanted this witness to give the usual course as pursued in his Department, over which he presides, with a view of showing what course these letters took in that matter.

THE COURT: My understanding is that that was covered by the regulations which were introduced in evidence.

Q. State to the Jury, after such letters reached your office, under whose control those letters were?

A. They were under mine.

Q. You were the Chief Post Office Inspector?

A. Yes sir.

Q. And Mr. Smith was a subordinate of yours, in your office?

A. Yes.

Cross-examination.

Mr. LEHMANN:

Q. Mr. Cochran you stated that you were the Chief Post Office Inspector at that time?

A. Yes sir.

Q. What office do you now hold?

A. I am the Purchasing Agent for the Post Office Department

THOMAS B. HARLAN, being duly sworn, testifies as follows on the part of the Government:

Direct examination.

Mr. DYER:

Q. Your name is Thomas B. Harlan?

A. Yes sir.

Q. You are a lawyer in this City?

A. Yes sir.

190 Q. In November 1902 were you an Attorney for the Rialto Grain and Securities Company in this City?

A. Yes sir.

Q. I show you a letter, or what purports to be a copy of a letter, of November the eighteenth 1902, and ask you to state whether the original of that letter was written by you in the City of St. Louis on

the eighteenth and mailed at the City of St. Louis on that date, to J. R. Burton at Washington, D. C.?

A. Yes sir.

COUNSEL FOR THE GOVERNMENT. I now offer this letter in evidence, it is in words and figures as follows to wit:

NOVEMBER 18TH 1902.

Hon. J. R. Burton, Senate Chamber, Washington, D. C.

MY DEAR SIR: Mr. Kastor and I arrived safely, and on time this A. M. I found myself confronted with a number of engagements, which together with Major Dennis' condition, prevented me from wiring you as early an hour as I expected. However, I hope you received my message to the effect that this Company accepts your terms to act as Counsel at a salary of $500.00 per month, said service to begin immediately; that is, of this date, November 18th, 1902. I have been unable to get any definite information of the present proceedings before the Federal Grand Jury. You will recall that these proceedings grow out of the business conducted under
191 the name of the Brooks Brokerage & Commission Company, a business organized about the first of February of this year, by a man named C. H. Brooks. Brooks run the business to about the first of June, when he sold his stock to our client, Major H. C. Dennis, Major Dennis was then as he is now, general agent of the Hartford Life Insurance Company, and continued to give his attentions to the life insurance business, transferring the management of the brokerage business to one K. C. Waldon, who had been Secretary of the Company under Mr. Brooks' management. Mr. Waldon had charge of all the details. About the 27th of July, Mr. Brooks, who was then in California, wired Major Dennis to the effect that he would take a half interest in the business, back it with a credit of $50,000.00, and add new features. Such was the substance of the telegram. I am unable to give the exact wording at the present time, because it, as well as other telegrams that passed at that time, is in the hands of the Post Office Inspectors of this District. To the message of Brooks, Major Dennis answered that he could not accept the offer, as he had made other arrangements. Brooks thereupon wired to Waldon, who was still acting as Secretary of the Brooks Brokerage and Commission Company, asking Waldon to join with him, Brooks, in a fight upon Dennis, for the purpose of "busting" the concern. Brooks immediately left California, arriving here a few days later, and bringing with him a lawyer from California, and started a collection agency under the name of the "Guar-
192 antee Collection Agency," using the name of no individual, but sent out a false and libelous circular, charging the Brooks Brokerage and Commission Company with doing a fraudulent business, violating the State and Postal Laws, etc., and soliciting from the former customers of the Brooks Brokerage and Commission Company (The names of said customers having been obtained by Waldon) and proposing in said circular to take claims against said brokerage company on the basis of ten per cent., agreeing to pay all Court costs

and other expenses. They succeeded in getting in a large number of claims, possibly one hundred and fifty, and filed about fifteen suits on said claims. At the same time, Brooks took up the matter with the Postal authorities, presenting to them some of the correspondence that he had collected through his collection agency, and by misrepresenting Dennis, brought about an investigation by the Post Office Inspectors. This examination proved to be a little more than Mr. Brooks expected; every record, every letter or other scrap of evidence that could be produced was turned over to the Inspectors, and, though Mr. Brooks had taken with him his record books, and no doubt supposed that he had destroyed all evidence that might in any manner incriminate him, we succeeded in finding one letter—letter copy-book and two ordinary letter files full of letters, all of which contained some damaging evidence against Mr. Brooks, and it now looks as though Mr. Brooks would be indicted by the
193 Federal Grand Jury now in session, on a charge of a fraudulent use of the Mails. The Post Office Inspectors realize that Major Dennis stumbled into the thing inadvertently, or at least innocently, and do not hesitate to say so. They fear, however, to assume any responsibility, and we have directed our labors to avoid Major Dennis' name being mentioned in connection with that of Brooks in an indictment, should one be found. It is well recognized, that Mr. Brooks was actuated in this matter in a spirit of revenge, and later sought to "hold up" Dennis, by demanding $25,000.00, as a condition not to prosecute in the Federal Courts.

The above facts, which constitute a mere outline of the present situation, will, I believe, be sufficient to show Major Dennis' present danger as well as his innocence on any wrong doing in the matter. That he is innocent, I know from my own knowledge, and I know also, as a man, that no one would do more to prevent an intentional wrong than Major Dennis. Up to the present time, no indictment has been found. The Federal Grand Jury will probably be discharged this week. I do not know what reports have been sent into the Post Office Department at Washington, nor am I prepared to say that the Government intends to make a case against Major Dennis; but if you can find it convenient to inquire of these facts at the Department, you may be able to perform for us a great service at this time. Should any action be taken here by the Grand Jury, I will wire you at once.

Yours very truly,"

Q. You signed the original of this letter, did you?

194 A. Yes sir.

Q. And to that letter, did you receive an answer?

A. Yes sir.

Q. I show you one dated November the twentieth 1902, and will ask you to state whether you received that from Senator Burton in answer to the letter that I have just read?

A. Yes sir.

COUNSEL FOR THE GOVERNMENT: Now I offer this letter, which is in words and figures as follows to wit:

"Fifty-seventh Congress."

Mr. Burton, Chairman.

W. W. Smith, Clerk.

United States Senate.

Committee on Forest Reservations and the Protection of Game.

NOVEMBER 20, 1902.

Mr. Thomas B. Harlan, Rialto Grain and Securi[illegible] Company, St. Louis, Mo.

DEAR SIR: Your favor of November 18th received I called at the Department this morning and find that there are two complainted lodged against your Company. One by Bella Evans and the other by Mrs. K. C. Hout, both of Albany, New York. These complaints were sent out from the main office here for investigation on the seventh of November, and doubtless the Inspector there has called your attention to them before now. If he has not, he will do so very soon.

195 I should like to be advised what there is in these complaints. Without knowing anything about the merits of the same, I would advise that all complaints receive special attention by your Company, and if possible satisfy the complaints, especially should this be your motto until after this Brooks matter is entirely out of the way.

I have arranged with the Department to be advised in case any complaints are made against your Company, and have arranged for a hearing if any hearing should become necessary. I have assured the Department that it is the purpose of your Company to comply strictly with the law, and that it is your desire to remain at all times in perfect harmony with the Department.

No action of any kind will be taken against you without my first being notified, and every opportunity for a full explanation or hearing will be had.

In return, if agreeable, you may make remittance for my first month's pay.

Faithfully yours,

J. R. BURTON."

Q. I show you a paper dated November twenty-second 1902 addressed to the Honorable J. R. Burton, Senate Chamber, Washington, D. C., and ask you what that is?

A. That is a carbon copy of a letter that I wrote to Senator Burton on November the twenty-second 1902. This copy bears no signature, but the original letter was signed by me.

Q. And this is an exact copy of the original letter that you sent, save and except only your signature?

A. Yes sir.

Q. This was dated at St. Louis, a letter written at St. Louis?

196 A. Yes sir.

COUNSEL FOR THE GOVERNMENT: Now I offer this letter in evidence, it is in words and figures as follows to wit:

NOVEMBER 22ND, 1902.

Hon. J. R. Burton, Care Senate Chamber, Washington, D. C.

MY DEAR SIR: We have your favour of recent date, and contents noted. The claims that you referred to against the Rialto Grain and Securities Company, have been investigated by the Post Office Inspector connected with this Department and he found the actions of our Company to be all right, and, we are informed, made a report in favor of our Company relative to the same.

I now comtemplate leaving here Monday night for Washington, and should, in due course, arrive there on Wednesday morning, and sometime during Wednesday will take the liberty of calling on you if convenient to you.

Everything is running very nicely here, but as I hope to see you within a few days, I will wait until then to explain some matters that have come up since my last communication.

I enclose the Company's check for $500.00, as per agreement. This check should have been sent in my former communication, but I neglected to do so.

Hoping that I shall have the pleasure of a personal interview at an early date, I remain,

Yours very truly,"

—— ——.

197 Q. Look at that and state whether that was enclosed in the letter that I have just last read (handing witness check)?

A. Yes, sir, it was, yes sir.

COUNSEL FOR THE GOVERNMENT: I offer this check in evidence, with its endorsement, it is in words and figures as follows to wit:

Rialto Grain & Securities Co.

(Incorporated.)

No. 624.

Secretary's Check Issued.

General Office Rialto Bld., St. Louis.

Nov. 29, 1902.

Commonwealth Trust Company.

$500. ST. LOUIS, MISSOURI, *Nov.* 22, 1902.

Pay to the order of J. R. Burton Five hundred dollars $500.00/00.

To the Commonwealth Trust Co., St. Louis, Mo.

RIALTO GRAIN & SECURITIES CO.,
By HUGH C. DENNIS, *President.*

Indorsed on the back: J. R. Burton Pay Commercial Nat'l. Bank, Chicago, or order, The Riggs National Bank of Washington, D. C. Arthur T. Brice, Cashier. Pay Franklin Bank St. Louis, Mo. or order, Commercial National Bank of Chicago. Jos. T. Talbert, Cashier L. Kraemer, A. Cashier (Perforated) Paid."

Q. I show you a paper bearing date December second, 1902, and ask you to state to the Jury what that is?

A. This is a carbon copy of a letter written by me to Senator Burton from St. Louis, Mo. on December second, 1902. No signature appears here (indicating) but the original was signed by me.

COUNSEL FOR THE GOVERNMENT: I offer that letter in evidence, it is dated December the second 1902.

COUNSEL FOR DEFENDANT: I wish to make the objection
198 to that letter that the letter was never answered nor acted upon.

The COURT: That this particular letter was never answered nor acted upon.

COUNSEL FOR DEFENDANT: Of course, this is a little premature, in a certain way, of course, but that is the ground upon which I place it. It will not be shown that that was answered or acted upon by the Defendant.

COUNSEL FOR THE GOVERNMENT: The Government, your Honor, will undertake to connect the Defendant with these matters mentioned in that letter.

COUNSEL FOR DEFENDANT: Our objection applies to the third and fourth paragraph of the letter.

The COURT: Is is stated by the Counsel for the Government that they expect to connect the Defendant with this matter that Counsel for the Defendant has just pointed out?

COUNSEL FOR THE GOVERNMENT: Yes, we expect to do that.

The COURT: You may read the letter. Exceptions will be allowed.

To which ruling of the Court Defendant, by Counsel, then and there duly accepted.

COUNSEL FOR THE GOVERNMENT: This letter is in words and figures as follows to wit:

199

DECEMBER 2ND, 1902.

Hon. J. R. Burton, Care of Senate Chamber, Washington, D. C.

MY DEAR SIR: On Saturday night, I wired you that indictment had been returned, bonds given, and etc. I was somewhat surprised on my return here Saturday night to be met at the train by one of the clerks of the Rialto Company, who informed me that Major Dennis and Mr. Garland had been indicted and that day arrested. Later on, I learned also that Mr. Brooks had been included in the indictments, and had also been arrested and given Bond. I have not yet seen the indictments, and do not know whether these parties were indicted jointly, nor do I know the specific charges against them. I expect to have a copy of the indictment by to-morrow.

Thus you see, that all efforts to prevent this action, were defeated almost before we got started. The question is, how to meet the situation as it now exists.

As was to be expected, the fact of the indictments was telegraphed as a news item all over the country and to-day's mails have brought in several communications threatening in their nature, and the

balance of the week will probably bring a great many more. Wherever a party requests his account closed the same will be done promptly and whatever he is entitled to will be at once remitted, and such accounts will probably never be heard of again. It is where
200 parties have lost money by action of the market that will give us the most trouble, as they will undertake to blackmail the Company into paying them something that they are not entitled to. In all such cases, we have determined to stand strictly on our rights, and the result will probably be numerous complaints pouring into Washington from different parts of the Country. We will be able to meet each one of these cases individually and show the Post Office Department a clean record. It is more the fact that the Post Office has advertised its intention to take hold of these cases that will bring the complaints, than any justness that they will contain. Locally, I believe we will be able to control the situation, as this business has been pretty thoroughly gone over by the Inspectors, and they understand just what we are doing and how we are doing it.

At your end of the line you will, of course, use your own judgment in handling the situation. We will, at all times, be glad to observe any request made by the Post Office Department or to submit to any examination that they may direct.

The cases here are set for trial on the 6th of January, and Judge Krum and I are preparing now for trial. We will get all the evidence in shape; I will thoroughly brief the law pertaining to the cases, and when we have got matters worked out, we will submit the whole case to you for your consideration, and would certainly much appreciate it if you could find it convenient to be here to participate in the defense.

Yours very truly"

201 "Mrs. Harlan and I enjoyed our visit to Washington very much and shall ever feel kindly for the many courtesies you extended to us."

Q. I show you a paper bearing date December 1902, addressed to Hon. J. R. Burton, Senate Chamber, Washington, D. C., and ask you what it was?

COUNSEL FOR DEFENDANT: I think you stated the fifth, see if it was not December third.

Q. December third?

A. This is a carbon copy of a letter written by me and mailed to Senator Burton at Washington, dated St. Louis, Mo. December third 1902. This copy is not signed, but I signed the original.

Q. Of which this is a copy?

A. Of which this is a copy. The words "St. Louis Missouri" do not appear here, but I know that that was the original copy, printed on there.

COUNSEL FOR THE GOVERNMENT: I offer this letter in evidence, it is in words and figures as follows to wit:

"DECEMBER 3RD, 1902.

Hon. J. R. Burton, Care of Senate Chamber, Washington, D. C.

MY DEAR SIR: On Monday of this week, a man dropped into the office of the Rialto Company by the name of J. H. Bowman, of Allentown, Pa. He had an account with the Company, having invested about fifteen hundred dollars, on a part of which he had some loss, and other part some gain. I was not there at the time, but he saw Mr. Leftwich, who is Vice-President of the Rialto Company; and, after representing himself to be a Post Office Inspector, in fact,
202 he produced a business card to the effect that he was a Post Office Inspector—he undertook to use his official position to force a settlement of his account contrary to his just rights, and did succeed by reason of his representation, in getting a little the best of the Company.

Now, this morning's mail brings us a letter from Colorado Springs, from a Mr. Shove, which I enclose to you, and which indicates that some officer of the law—presumably some one that would leave the inference that he was a Post Office Inspector—had called on Mr. Shoves. It is my opinion, that these fellows are not what they represent themselves to be. But if they are Post Office Inspectors, then it would appear that some order has been issued—evidently from head quarters—to try to catch the Rialto Company in a trap. This they cannot do by any honest methods, nor is the matter one of much consequence, except we would like to know if we are being investigated in this manner.

I call your attention to it merely as a matter for your own information.

I have just returned from a consultation with Judge Krum. He had a copy of the indictment, and we considered the same, and both feel that the case against Dennis and Garland will be taken from the Jury. Up to the present time, I have found no authority to sustain the Government's position, nor do I see how they can make a case against either Dennis or Garland.
203 To-day's mails have brought in a number of letters enclosing newspaper clippings, but most of the letters are very fair, and if the situation gets no worse than it now appears, the Rialto Company will have but little trouble in getting through with the situation. Will keep you fully informed.

Yours very truly,

——— ———.

P. S.—Bowman represented that he was connected with Philadelphia Office"

Q. I will get you to state whether that letter of December third, written by you to Burton, was answered by him, and if so, whether that is an answer, the answer that you have in your hand (handing witness letter)?

A. Yes sir, this is the answer.

Q. You received that at St. Louis, the answer to your letter?

A. Yes sir.

COUNSEL FOR DEFENDANT: What is the date of that?
COUNSEL FOR THE GOVERNMENT: December 9th, 1902. I offer this letter in evidence, it is in words and figures as follows to wit:

United States Senate.

Committee on Forest Reservation and the Protection of Game

DECEMBER 9TH, 1902.

Mr. Thomas B. Harlan, St. Louis, Mo.

MY DEAR HARLAN: There is no man by the name of J. H. Bowman who is a post office inspector. This man Bowman is im-
204 personating a post office inspector, violated the *the* statutes, and laid himself liable to punishment. The man operating in Colorado Springs was also a fraud. There has gone from this office no instructions whatever about the Rialto Company, and there is nothing in this office against you at this time. The matter in St. Louis, as you know, is in the hands of Mr. Dice there. I herewith return the letter.

I would suggest that you prepare carefully the case of Dennis for early next month, and I have learned to know that you must watch carefully that the jury is not set up on you.

By the way: can you get a fair trial before Adams. These are all important questions that you must carefully consider.

I will take care of things at this end of the line.

Please keep me constantly advised.

Faithfully yours, J. R. BURTON."

Q. I show you a letter of January nineteenth, 1903, and ask you if you received that letter from the Defendant in the City of St. Louis?
A. Yes sir.

COUNSEL FOR DEFENDANT: We object to that letter as immaterial. It is in regard to payment for the month of January. That is not material in this case.

The COURT: The objection will be over ruled. The pertinence of the letter is somewhat doubtful just at this time, but, in view of the fact that an agreement is charged——
205 COUNSEL FOR DEFENDANT: The agreement was completed before that time, and no subsequent conduct could make that wrongful, which was not shown so at the time the agreement was made.

The agreement is charged as one offense, the receipt of compensation as another, and a distinct offense. This does not relate to the third and fifth counts, and cannot relate to them. It is clearly inadmissible under them. Now, it is held by the Courts that where an agreement is made, or where something is done, innocently, at the time, it can't be made wrongful by anything done thereafter coupling together with it.

The COURT: Yes, but while an agreement is here charged, it is also denied, necessarily so by the plea of not guilty. The agreement can be shown, not merely by evidence from somebody who

was present at the time, but by the conduct of the parties later on. That is; it may be shown that their subsequent conduct was in recognition of an existing agreement; that they themselves were, by their action, acknowledging the existance of an agreement. This letter standing alone, and unexplained, would be of but very little moment, and it will almost necessarily, fall to the ground, unless
206 there is some other evidence.

To which ruling of the Court Defendant, by Counsel then and there duly *accepted*.

Thereupon Counsel for the Government read in evidence the letter in question, dated January 19th 1903, in words and figures as follows to wit:

"Fifty-Seventh Congress,

Mr. Burton, Chairman,

W. W. Smith, Clerk.

United States Senate.

Committee on Forest Reservations and the Protection of Game.

JANUARY 19TH, 1903.

Mr. Thomas B. Harlan, St. Louis, Mo.

MY DEAR SIR: You told me when I was in St. Louis if draft did not arrive promptly to notify you. As you recall, it was due the fifteenth, and this is the nineteenth. After this shall I make draft on the fifteenth.

Have heard nothing from you about the case.

Please tell me how you came out.

Faithfully yours, J. R. BURTON."

Q. I show you a letter dated January 22nd, 1903, addressed to J. R. Burton, Washington, D. C. and ask you to state to the Jury whether or not that letter was submitted to Senator Burton
207 at any time in the City of St. Louis?

A. Yes, this is one of the carbon copies of letters that was in my possession; handed by me to Senator Burton; subsequently returned to me, and handed by me to you.

Q. State whether or not, when the letter was handed to Senator Burton—what he said with reference to having received the original of that, if he said anything?

A. Well he didn't say anything. The letters were handed to him in a bundle in an envelope, all of them together, and my recollection is he just laid them on the table near by. I handed them to him at the Southern Hotel; that is my recollection of it. I don't remember that those letters were exhibited at the time; but, this is one of the letters.

Q. Do you know, of your own knowledge, at the time that letter was written, and by whom it was written?

A. I can't—I have no recollection. The letter was not written

by me. Whether it was shown to me at the time, I have no means in the world of telling. I don't remember it.

Q. Look at this check and say whether or not you know of that check having been sent on that occasion (indicating check)?

A. I know that that check was sent to Senator Burton, yes sir.

COUNSEL FOR THE DEFENDANT: We object to that. The check relates to matters not involved here, and it is incompetent.

Q. I will get you to state whether or not these letters—this letter that I have shown you was in your possession at any time, and whether or not you with this Defendant asked for the examination of these letters, and this letter was shown to you?

A. No, those letters were all together in a large envelope.

208 Q. Well, was this one of them?

A. That has the appearance of being one. I am sure that it is one, yes sir.

Q. I will get you to state whether or not this letter together with others, some of which I have read, whether they were shown to Burton and by him stated at the time that he had received them?

A. I handed that envelope to Senator Burton without examining its contents at his room in the Southern Hotel, in the presence of Judge Krum, and my recollection is that they were laid on the table. The next time I saw that envelope was when it was handed to me by Judge Krum. I don't remember of ever examining those letters with Senator Burton.

Q. I will get you to state whether or not these letters had not been by you placed in my possession, and whether or not, at the instance of the Defendant, all of these letters were turned over to you for his examination, and whether or not upon the examination he said that he did or did not receive the letters that I gave to you?

A. I got these letters from Judge Krum, and brought them here and handed them to you in the Grand Jury room. Now I don't remember any subsequent order. I may be altogether wrong about it. I don't remember any though.

Q. Do you remember having these letters in the Grand Jury Room, and then, subsequently coming and getting the letters for the inspection of Mr. Burton after the stipulation was filed?

A. Yes, I believe that is true now, that I got these letters from you. That is a very dim recollection on my part, by I think it is correct.

Q. Now when you got this letter, together with the others, that I read, didn't you give the letters to Burton, and didn't Bur-

209 ton at that time acknowledge that he had received this together with the other letters, and was not that subsequently returned and used in the file under the stipulation.

COUNSEL FOR PLAINTIFF: We object to that. It is wholly immaterial what was done at that trial.

COUNSEL FOR THE GOVERNMENT: I am trying to refresh the memory of this witness.

The COURT: Don't make any response as to what was done at the other trial.

COUNSEL FOR DEFENDANT: I object to the letter for the reason that it is irrelevant and immaterial.

The COURT: Do you make any objection on account of the authenticity?

COUNSEL FOR DEFENDANT: I do nothing by implication. I distinctly make no objection to it on score of its authenticity. I confine my objection strictly—excluding every other element from it—to its relevancy and immateriality. I make the objection that it is irrelevant and immaterial, and make no objection whatever on the score of its authenticity.

210

The COURT: I will let him read the letter in evidence then.

To which ruling of the Court Defendant, by Counsel, then and there duly excepted.

COUNSEL FOR THE GOVERNMENT: I offer the letter and the check in evidence, in words and figures as follows, to wit:

"JANUARY 22, 1903.

Hon. J. R. Burton, United States Senate, Washington, D. C.

MY DEAR SENATOR: I was horrified to-day to learn from Mr. Harlan that check for your current month's salary had not been sent you. This matter I had left entirely in Mr. Harlan's hands, and supposed that it was always attended to. His interest in the Federal case against me, which closed, as you probably know, by the Court throwing the case out, without our being called on to offer a single line of evidence, is extremely pleasing to me, and is doubtless the cause of his over looking to forward your check. I have given instructions that your matter shall hereafter be referred to me, and I can promise that no delay will occur again in promptly forwarding your check.

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With sincere and kindly regards, I am,

Yours faithfully,

RIALTO GRAIN AND SECURITIES COMPANY,

—— ——, *President.*"

HCD/MLB

COUNSEL FOR THE GOVERNMENT: I will now read the check which was sent with this letter.

COUNSEL FOR DEFENDANT: I make the same objection to the check that I made to the previous letter, the one just read.

The COURT: The objection will be overruled.

To which ruling of the Court, Defendant, by Counsel, then and there duly accepted.

COUNSEL FOR PLAINTIFF: The check is in words and figures as follows to wit:

Rialto Grain & Securities Co. (Incorporated.)

No. 1689.

General Office: Rialto Bldg., St. Louis.

$500. St. Louis, Mo., *Jan.* 22, 1903.

Pay to the order of J. R. Burton $500 (Five Hundred Dollars).

R. T.

Jan. 27, 1903.

Commonwealth Trust Company, St. Louis, Mo.

RIALTO GRAIN & SECURITIES CO.

By HUGH C. DENNIS, *President.*

Countersigned:

W. D. MAHANEY, *V. Prest., Treasr., Comptroller.*

(Endorsed on back:) J. R. Burton, Pay B. F. Edwards, Cashier or order, The Riggs National Bank of Washington, D. C.
212 Arthur T. Brice, Cashier, 26 St. Louis Clearing House, The Nat'l Bank of Commerce in St. Louis. (Perforated) paid.

The COURT: I think you ought to identify the signature on the back of these two checks.

COUNSEL FOR DEFENDANT: That is not necessary. The endorsement, J. R. Burton, on the back of the first check is in the hand writing of the Defendant. The same is true as to the check dated December 15th and the other one of February the 16th; that is as to the hand writing in the name of "J. R. Burton."

COUNSEL FOR THE GOVERNMENT: That being admitted I will not call Mr. Brice, who is here as a witness to identify these checks, and we can dispense with Mr. Brice's presence any time he desires to avail himself of the opportunity.

COUNSEL FOR PLAINTIFF: I now offer this letter of January the twenty-second, 1903.

NOTE.—Upon the objection of Counsel for Defendant that this letter was in no wise connected with the subject matter, with the possible exception of the first paragraph, but that the whole thing was objected to as having no bearing on the case at all, the letter in question was withdrawn for the time being by Counsel for the Government.

Q. I will get you to state whether or not you received this letter date- February the eleventh, 1903?

A. Yes sir.

COUNSEL FOR THE GOVERNMENT: I now offer this letter
213 in evidence, in words and figures as follows to wit:

"Fifty-seventh Congress,"

Mr. Burton, Chairman,

W. W. Smith, Clerk,

United States Senate

Committee on Forest Reservation and the Protection of Game.

FEBRUARY 11TH, 1903.

Mr. Thomas B. Harlan, St. Louis, Mo.

MY DEAR HARLAN: I have your telegram telling me that things were satisfactory between you and Dice. I hope you are not letting him mislead you in any way.

I will be in St. Louis the fore part of next month, so soon as Congress adjourns, and shall aim to remain several days.

Be sure and keep me advised if there is anything to do at this end of the line before going away. I have tried to keep the Department in a good humor with Major Dennis, and think I have succeeded.

If agreeable, on receipt of this, I wish you would have my monthly pay sent in, so I can reach it by Monday next.

Faithfully yours,

J. R. BURTON."

Q. Mr. Harlan, in a letter that I have read, of yours, of December the second 1902, you say "On Saturday night I wired you that indictment had been returned, bond given, etc." have you a copy of that message?

A. I have not.

Q. I show you a telegram of date February the eleventh 1903, and will ask you if you received that telegram?

214 A. I did.

Q. Do you recollect the date of its receipt?

A. (Examining telegram.) That was received on February the eleventh.

COUNSEL FOR THE GOVERNMENT: Now I offer this telegram, in words and figures as follows.

COUNSEL FOR THE DEFENDANT: We object to it as irrelevant. It relates to an inquiry with respect to Mr. McGowan, in the Indian Department, and is not a matter in which the Government could have been interested at all—McGowan making a claim, and saying he was in the Indian Department, and they request inquiries as to whether he was. That is not a matter in which the Government had any interest at all. I predicate that right on the face of the telegram.

COUNSEL FOR THE GOVERNMENT: The claim of the Government is that the original contract contemplated services other than simply before, or with respect to a certain criminal case against Major Dennis. This is the claim, as I understand, and the defense that he was employed for that purpose; and this has a bearing—the fact, that we will show, or attempt to show, that the Rialto Company communicated with Senator Burton there and asked him, as Counsel, to obtain this information in another Department, and that has a bearing upon the question as to what the original contract contemplated.

The COURT: I still can't tell anything about it until I see the telegram.

Q. Do you remember sending a telegram yourself to Senator Burton that brought that answer to you?

A. Yes sir, I do, my recollection is it was sent on the even-
215 ing previous; which would be February tenth, 1903.

Q. Have you a copy of that telegram?

A. No, I have not. It was written in pencil, as I remember, and handed to the telegraph operator.

Q. Did you have any talk with Senator Burton about that telegram that you received, that the Court has now, with reference to your own telegram of the evening before?

COUNSEL FOR DEFENDANT: Now we object to that as immaterial.

The COURT: That is a preliminary question as to whether he had any conversation. He can answer that.

A. Do you mean before or after the telegram?

Q. After.

A. I don't know of any. No, I couldn't have had because I didn't see Senator Burton until the night of the fifteenth of April after that.

Q. That is the telegram you sent—a copy of which you have not got—a copy of the telegram you sent the night before?

A. I have not a copy of it.

COUNSEL FOR THE GOVERNMENT: I desire to show, and unless it is admitted will show, that with all telegrams delivered at the telegraph office, the original telegrams are destroyed within six months after the delivery of the telegram. That the original telegram is not now in the possession of the Company, because it has been destroyed, and that I am unable to produce either the original or a copy of that telegram, this witness not having retained a copy. Now I ask to prove by this witness the contents of that telegram to which this one that your Honor has is an answer.

216 COUNSEL FOR DEFENDANT: I object to that for the same reason that I object to the telegram itself. I am making no objection to that on the ground that it has not been duly authenticated at all. I object to the subject matter.

The COURT: On the face of this telegram, having nothing more, I shall decline to admit it in evidence. The telegram which preceded it—if there was one—to which this is an answer—might, if it were shown, be such as would make this material along the lines that the character of the employment was not merely the defending against an indictment. But I will ask you first whether that is really your contention; are you making the contention that the employment was such.

COUNSEL FOR DEFENDANT: I do not make such contentions; on the contrary I stated differently to the Jury.

The COURT: Then this telegram will not be admitted.

COUNSEL FOR THE GOVERNMENT: Will your Honor allow me to

ask this witness, with the statement I have already made, as to what that telegram in question contained.

The COURT: If it was simply an inquiry calling for an answer such as was given, I think it is immaterial at the present stage of the proceeding, in the light of the admission made by Counsel for the Defendant.

Cross-examination.

Mr. LEHMANN:

Q. Mr. Harlan, Colonel Dyer made some inquiries with respect to those letters having been handed by you in a bunch to Senator
217 Burton, at some time; was that after the indictment was found against him?

A. Yes sir when he came on from Washington.

Q. And those letters, copies, and the originals, as far as they are original, were turned over by you to him, and were in his possession?

A. Yes sir.

Q. (Continuing:) And this letter—after the indictment—and after you had turned over these letters to him, you were brought before the Grand Jury and examined in respect to them?

A. Yes sir, I produced them, and identified them.

Q. Well you were asked with respect to them by the Grand Jury, and you produced them by going down to Senator Burton, as Counsel, and getting them, and they gave you the letters?

A. Yes sir I got them from Judge Krum's office.

Q. And they were in the custody of the Defendant and voluntarily delivered over?

A. Yes sir.

Q. Now, the first letter I find here is of date November eighteenth 1902. How did you come to write that letter.

COUNSEL FOR THE GOVERNMENT: I object to that, as not growing out of the examination in chief.

218 Thereupon the Court admonished the Jury as to its conduct during the adjournment of the Court, and the Court adjourned the further hearing of this cause to Wednesday, November twenty-second, 1905 at ten o'clock A. M. (the following day).

ST. LOUIS, *November* 22, 1905.

Met pursuant to adjournment, on Wednesday, November 22, 1905, at ten o'clock a. m., when the following proceedings were had:

THE COURT: The objection made at the time of adjournment last evening is overruled.

Mr. Harlan is present and may take the stand, if that is the wish of counsel.

The cross-examination of JAS. B. HARLAN continued.

By Mr. F. W. LEHMANN:

Q. The question referred to the letter of November 18, 1902. I asked you how you came to write that letter?

The COURT: That was the first letter of the series, was it?
Mr. LEHMANN: Yes, sir.

A. (After examining letter.) This letter was written pursuant to a conversation that I had with Senator Burton; that I had previously, that is, on the 17th of November, 1902.

Q. Will you please state what occurred on that date between
219 you and Senator Burton, which led to the writing of that letter.

A. That was a conversation that lasted several hours. I met Senator Burton, got on the train with him—

Q. Where did you meet him?

A. I met him in front of the Rialto Building, on the corner of Fourth and Olive Streets in the City of St. Louis.

Q. Had you been acquainted with him theretofore?

A. No, sir, I had not. I met him then for the first time.

Q. Who introduced you to him?

A. I think it was Mr. Ernest Kastor. Mr. Kastor and Senator Burton were in a carriage, on their way to the Union Station, and Major Dennis took me out of the Rialto Building to the carriage, walked out with me, and I was introduced to Senator Burton.

Q. Who was Major Dennis, by the way?

A. Major Dennis, or Huch C. Dennis, was President of the Rialto Grain & Securities Company.

Q. Do you know whether he was a large stockholder in that Company?

A. Yes, sir, he owned considerably more than a majority of the stock; nearly all of the stock.

Q. Nearly all of it?

A. Yes, sir.

Q. So he controlled the Company?

A. Yes, sir.

Q. Where was that Company engaged in business?

A. The Company was engaged in business in the City of St. Louis; its offices were located in the Rialto Building in this city.

220 Q. And I believe you stated your relation to the Company on your direct examination?

A. Yes sir; I was counsel—one of the counsel.

Q. After you had been introduced to Mr. Burton what occurred?

A. They were in a hurry, and I stepped into the carraige; got into the carriage. We drove to the Union Station, trying to catch the Ilinois Central train that left at noon for Chicago, and missed that train; and as I had no opportunity to talk with Senator Burton about the matter which I wished to speak to him about, I got on the train with him and Mr. Ernest Kastor, and went to Chicago.

Q. You say you missed the train?

A. We missed the Illinois Central train, and took the Chicago & Alton train leaving ten minutes later; and went to Chicago on the Chicago & Alton train.

Q. Who is it that went on that train on that occasion?

A. Senator Burton, Mr. Ernest Kastor and myself.

Q. That train pulls right out of the Union Station and across the river into Illinois?

A. Yes sir.

Q. What did you do while you were on the train?

A. It was while on the train that I talked this matter of the Rialto Grain & Securities Company over with Senator Burton.

Q. Did you begin that conversation as soon as you got into the car?

A. No. No. For a considerably time our conversation was on subjects entirely foreign, and, as I remember it, we really
221 got to talking about the matter in hand while we were sitting at the table in the dining car.

Q. Where was that? In what State?

A. That was in the State of Illinois, and about the time we were approaching Springfield, as near as I can remember.

Q. State what conversation occurred there, between you, that led up to or had reference to that letter of November 18, 1902?

A. I don't know just how the conversation opened; but the first thing I explained to Senator Burton was the controversy then pending between Charles H. Brooks and Huch C. Dennis.

Q. What did you say to him with reference to that?

A. I explained to him the existence of the Brooks Brokerage & Commission Company.

Q. Kindly, Mr. Harlan, state what it was that you said?

A. That would be utterly impossible, to try to repeat the exact language. It has been more than three years ago.

Q. State it in substance, as nearly as you can recollect it. You see when you say "explained" to him, that does not convey any distinct idea.

A. I told him that the Brooks Brokerage & Commission Company had been organied by a man named Brooks, who had conducted the business of that Company up to the first part of June, 1902, when he sold the stock of that Company to Huch C. Dennis. That some time after the transfer of that stock to Major Dennis, I think it was in August, 1902, Mr. Brooks had requested by telegram the privilege of buying half of the stock that he had sold to Major Dennis in the Brooks Brokerage & Commission Company, and, being re-
222 fused, he had declared war upon Major Dennis—

The COURT:

Q. Are you stating what you told Senator Burton or are you describing to the jury something that happened?

A. I am trying to give the substance of the conversation; the words it is utterly impossible for me to recall, the exact words used.

Q. The point I meant to inquire about is, whether you are confining yourself to matters which were actually in that conversation?

A. Yes, sir.

That Brooks had returned to St. Louis, bringing with him a lawyer; that they had organized a so-called Collection Agency, and by use of a false and libellous letter, which was sent to the customers of the Brooks Brokerage & Commission Company, Brooks by that

means had obtained a great many claims against the Brooks Brokerage & Commission Company. That as a result there had been filed fifteen civil suits; there were some twenty criminal libel suits, one suit to enjoin Brooks, and an investigation brought about by Brooks, admitting the correspondence that he got in through his Collection Agency to the Post Office Department—I say had brough- about an investigation. That investigation extending over a period of four weeks or more, had been completed, and as a result of that investigation it was probable that Major Dennis would be indicted by the Federal Grand Jury.

These matters were all gone over with considerable detail. I explained to Senator Burton—, or, rather, in the course of this
223 conversation I told Senator Burton of the organization of the Rialto Grain & Securities Company. I told him that the business of the Brooks Brokerage & Commission Company, as a result of this fight with Brooks and the Postoffice investigation, had ceased to do business, and its affairs were wound up. I told Senator Burton that the Rialto Grain & Securities Company had been organized by Major Dennis as its chief promoter, under the guidance of myself and Judge Chester H. Krum, a very prominent lawyer of this city. I told him the character of the business then being conducted by the Rialto Grain & Securities Company.

Q. What did you say to him that the character of that business was?

A. I explained to him—I told him that the Rialto Grain & Securities Company was organized as a dealer in grains and securities, havin*t* a right to deal under its charter, either on its own account or acting as agent for others. I explained to him that the business as conducted at that time was largely on margins; and explained to him, or told him, what marginal trading was, as near as I was able to explain.

In that connection, and along that same line, I told Senator Burton that the Rialto Grain & Securities Company contemplated the organization of a Department for the purchase and handling of securities for investment. I told him at great length how that department was to be operated. Senator Burton——

Q. What did you say to him about that?

A. In the course of the conversation Senator Burton had told me that he was a Director in the Kansas City, Mexico & Orient
224 Railroad Company, a railroad of which Mr. Stillwell of Kansas City is the President and chief promoter. Using this railroad to illustrate the idea, I told Senator Burton that this Department, this Securities Department of the Rialto Grain & Securities Company, would operate in this manner: That in the financing of the railroad—taking this particular railroad—the securities are first taken at a very considerable discount, usually by a Trust Company or some financial institution strong enough to arrange the underwriting syndicate; but that there was no means then existing whereby these securities could be quickly disposed of to small investors. Now this Department of the Rialto Grain & Securities Company, I told him, was intended to meet that situation. It was neces-

sary, I told him a great deal about Major Dennis. He did not know Major Dennis. I told him that Major Dennis was a man of more than ordinary ability. I told him that Major Dennis was a man of aggressive integrity; a man eminently fair in his dealings; and one of the best advertisers I ever saw; one of the most effective advertisers that I ever knew. I told Senator Burton that this plan of handling securities in this manner had been worked out by Major Dennis; and I told him that Major Dennis was the man to make a success of that kind of business.

Q. Did you tell him anything about Major Dennis' financial standing?

A. I did.

Q. What did you say?

225 A. I told him that at that time the Rialto Grain & Securities Company had on deposit in banks in the City of St. Louis —my recollection is that the figure I mentioned at that time was one hundred and twenty thousand dollars, in cash?

Q. Did you say anything to him as to what Major Dennis' business was, aside from the Rialto Grain & Securities Company?

A. I did.

Q. What did you say to him in that respect?

A. I told him that Major Dennis was a General Agent of the Hartford Life Insurance Company for the States of Missouri, Kansas and Arkansas. I told him that Major Dennis was a man who had a clean business record. I was particularly imbued with the idea——

Mr. ROBB: I submit that is not his story, what idea he was imbued with.

Mr. LEHMANN: I think the witness is trying to——

Mr. ROBB: Preach.

The COURT: The witness is a lawyer, and he knows he has no business to say what he was imbued with.

Mr. LEHMANN: I suppose a little phrase will creep in sometimes, inadvertently.

The COURT: It is better to omit those phrases.

Mr. Witness, you cannot help but appreciate that that is not a part of the testimony you are attempting to give.

Mr. LEHMANN (resuming):

Q. State the conversation; give a rescript of it as nearly as you can.

A. That—I——

226 Q. You were speaking of the securities feature, when I interrupted. About getting them into the hands of the small holders, or people of small means.

A. The result was, that Senator Burton expressed his confidence in that plan. And it was in that connection that I invited Senator Burton, I asked Senator Burton, to become associated with me as counsel for the Rialto Grain & Securities Company.

By that time we had finished our lunch, and went -ack—or forward, rather, into the Library car.

I told Senator Burton, however, that I did not feel authorized to close any agreement. I told him that anything that we did would have to be taken up with Major Dennis and receive his confirmation and approval.

But, as I say, after we had gone into the Library Car I asked Senator Burton what, in the event of his employment, compensation he would expect; and after thinking for a moment he replied that he thought he should receive five hundred dollars a month. To that I made no reply; but continuing he said "I don't think I ought to be shut off, however, at the end of a month; for instance, I would not want to go down and try that case, should Major Dennis be indicted, and then have this employment cut off." He says "I think it ought to continue for at least five months." I replied "Why, certainly, that is only fair."

Now, as I say, this conversation ran over a period of many hours, and I absolutely cannot give everything that was said.

Q. What was said Mr. Harlan, with respect to the services that Mr. Burton was to render in this employment? What was the
227 employment for, as stated in that conversation?

A. The first service was the defense of Major Dennis in the Federal court, should an indictment be returned against him as the result of the investigation of the Brooks Brokerage & Commission Company.

In connection with this Securities Department, I told Senator Burton that Major Dennis had suggested that I establish an office somewhere in the East, preferably New York, to represent the Company. I told him that we preferred a lawyer to represent the Company, and that in event of his employment that he would be the Eastern representative of this Company. That as such representative it would be his duty to cultivate the acquaintance of financiers, particularly people connected with Trust Companies and financial institutions that formed underwriting syndicates, and that he would be expected to look after those matters.

I also told him that he would be expected to come to St. Louis whenever occasion might require. He interposed an objection there, that he could not come if his duties in Congress were such as to detain him in Washington; and I readily accepted that; and that he was to act as counsel for the Company.

Q. What was said in the course of that conversation, if anything, respecting his position as United States Senator as relating to this matter?

A. When I asked Senator Burton if he would become counsel for this Company he said "Mr. Harlan, I am a United States Senator, and I am not going to accept any employment or do anything inconsistent with that position"; and I assured Senator Burton—I cannot give the exact language, but I remember it so well, the inci-
228 dent. I remember how emphatic I was in my statement to him that he would not be called upon or required to do anything inconsistent with his office as a United States Senator.

Q. Was there any reference in that conversation to the fact that the Rialto Grain & Securities Company used the mails extensively?

A. Yes, sir.

Q. And you had gone over—had made him aware of the fact that the apprehended incident against Dennis and others was in connection with the use of the mails?

A. With the use of the mails by the Brookes Brokerage & Commission Company.

Q. Yes, but in connection with the use of the mails?

A. Yes, sir.

Q. Was there anything said about that matter, about the use of the mails by the Rialto Grain & Securities Company, and services in the Postal Department?

A. I remember this: We had some discussion about the result of the investigation of the Brooks Brokerage & Commission Company. We talked about the law applicable to a case of that kind. I remember that Senator Burton, when I mentioned the Rialto Grain & Securities Company, asked me, he said "Now how are you going to avoid any trouble with your Rialto Company?" Then I told Senator Burton that it was the purpose, and the earnest desire of Major Dennis, and every one connected with the Rialto Grain & Securities Company, to keep so thoroughly within the law, that we did not care anything about the Post-office Department. That
229 the only place to meet the Post-office Department was by keeping on the right side of the law. I told him in that connection that it was a part of my duty as counsel for the Rialto Company, if there were any complaints, to have those complaints submitted to me, and that I took those complaints up with the complainants, and in every case adjusted the complaints according to the justice and the rights of the parties. So that if there was by perchance, through the handling of a great volume of business, any mistake made, that was the means provided for the remedy. And that was the situation, I told Senator Burton, and explained that fully to him when I talked with him.

Q. Was there anything said in that conversation as to whether or not there were any complaints against the Rialto Grain & Securities Company at that time?

A. There was not.

Q. You mean there were no complaints, or that you told Senator Burton there were no complaints?

A. I had no conversation with him on that subject. I did not tell him there were any complaints or that there were not any complaints.

Q. But you told him that the Rialto Grain & Securities Company proposed to keep on the right side of the law?

A. That was absolutely the whole intention, and I explained that, went over that at great length, because he seemed to be anxious on that subject.

Q. You say his proposal was to serve for Five Hundred Dollars a month, and for a period of not less than five months? What was said in that conversation as to when that employment was to begin?

230 A. There was nothing said as to when the employment was to begin.

Q. Do you recall when there was first anything said about when the employment was to begin? I call your attention to the letter of November 18, 1902, particularly the first paragraph of that letter, and ask you to read it?

A. "Mr. Kastor and I arrived safely and on time this a. m. I find myself confronted with a number of engagements which together with Major Dennis' condition prevented me writing you at as early an hour as I expected. However, I hope you received my message to the effect that this Company accepts your terms to act as counsel at a salary of Five Hundred Dollars per month, said services to begin immediately, that is, of this date, November 18, 1902."

Q. When was that feature first stated? Was it in that letter, is what I want; the date of beginning?

A. Yes, sir, was mentioned to Senator Burton.

Q. In that letter?

A. Yes, sir. It was talked over between Major Dennis and myself before I wrote this letter.

Q. But I mean as between you and Senator Burton, that letter was the first?

A. Yes, sir.

Q. You went on to Chicago with Mr. Burton?

A. Yes, sir.

Q. And left the matter in that form; that is, he proposing to serve for five hundred dollars a month for a period of not less than five months—Oh, first, what was said as to when the payment was to be be made? Was it in advance or at the end of the month?

231 A. I don't remember as to the conversation, but the payments were in fact made in advance.

Q. What did you do after getting to Chicago—I mean did you return home, or did you go further?

A. I returned home that night, arriving here on the following morning.

Q. Do you know where Senator Burton went, from what he said? That is, did he say he was going on to Washington?

A. I know he told me he was going on to Washington.

Q. I believe that first letter refers to a telegram, if I am not mistaken. This letter refers to a telegram that you sent; I assume it is a telegram because you say "I hope you received my message to the effect that this company accepts your terms, etc., etc." Did you in fact send such a telegram?

Mr. LEHMANN: We have not the telegram here is the reason I ask it.

A. I have no recollection other than the reference in the letter.

Q. You identified a letter of Senator Burton to you, under date of November 20, 1902; that was the answer to yours of the 18th?

A. Yes, sir.

Q. And in the interval between your writing to him and his first writing to you, had you seen him or heard from him at all, in that interval?

A. No, sir.

Q. And your first hearing from him was by this letter of November 20, 1902?

A. Yes, sir.

232 Q. Now this letter of November 20, 1902, refers to complaints by Bella Evans and by Mrs. K. C. Houts: Did you state to the Senator anything with respect to these, in the course of this conversation on your way to Chicago?

A. I did not.

Q. I call your attention now to a letter of yours dated November 22, 1902, and ask you to read it, especially the first paragraph. Read it to yourself.

Mr. DYER: So far as this other letter is concerned, I presume that the letter your Honor ruled on this morning was of the 18th of the month, referring to certain conversations had on the train, and which culminated in the employment of the defendant on the following day, at St. Louis. I understood that this examination was limited to that letter, and that the explanations which might follow in any other letter, was not proper examination of this witness.

The COURT: I did not intend to be thus specific, although I will consider that matter when we get around to the point when it arises. I did not mean to say as much, quite, as that.

Mr. LEHMANN: I assumed that the question would come up in the course of the examination.

Q. I will now ask you whether you had been, in fact, informed at the time you wrote this letter of November 22, 1902, that these claims had been investigated, and the action of your Company found to be all right?

Mr. DYER: That is objected to as not proper examination. The letter speaks for itself and must speak for itself on the examination.

The letter is complete within itself, without any explanation
233 being necessary concerning it.

The COURT: Mr. Lehmann, make a brief statement of your purpose in that.

Mr. LEHMANN: Simply to confirm the fact stated in the letter, that he had been so informed.

The COURT: What issue in this case would that tend to illustrate or bear upon?

Mr. LEHMANN: That the defendant was proceeding there in this matter, in the view that there was no trouble with this Company in the Department.

The COURT: You mean at Washington?

Mr. LEHMANN: Yes, and being informed of this——

The COURT: Would it re-inforce what might have been in the mind of the defendant as the result of that letter, to go into some matter that occurred here?

Mr. LEHMANN: I think so. That is, that it was not only a statement to him, but it was a fact. I am inclined to think so.

The COURT: The objection is sustained.

To which ruling the defendant, by his counsel, then and there at the time duly excepted.

Q. I call your attention to the letter of December 2, 1902, in which you say you had wired Mr. Burton that an indictment had been returned and bond given. I will ask you whether that had reference to the apprehended indictment that you had talked to him about on the way to Chicago?

Mr. DYER: I submit the letter speaks for itself and explains without any explanation as to its contents. It says "On Saturday night I wired you that indictments had been returned, bonds
234 given, etc.

The COURT: Your question is what?

Mr. LEHMANN: Simply to connect this with the apprehended indictment.

The COURT: The question may be answered.

Q. Was that the apprehended indictment?

A. Yes those are the indictments we apprehended at the time I talked to Senator Burton.

The COURT: Indictments against whom?

A. Indictments against Major Dennis and a man named T. W. Garland, joined in the indictment with him.

The COURT: That is sufficient.

(Mr. LEHMANN resuming):

Q. Now this letter of December 2, 1902, refers to a visit by you to Washington "Mrs. Harlan and I enjoyed our visit to Washington very much, etc." Do you recall that visit?

A. Yes, sir.

Q. Did you see Senator Burton in Washington at that time?

A. I did.

Q. Did you have a conference with him?

A. I did.

Q. What was the subject matter of that conference?

Mr. DYER: That is objected to.

Mr. LEHMANN: I propose to show that it was with reference to this apprehended indictment.

The COURT: This letter says nothing about a conference?

Mr. LEHMANN: By implication, I think "On Saturday night I wired you that indictments had been returned etc. I was somewhat surprised on my return," etc. It evidently implies, I think,
235 that this matter must have been under consideration by them.

The COURT: I think you may not now go into this conference on this cross examination. I do not mean to say that you shall not ask this witness, if you make him your own, about the conference at Washington. But it seems to me it would be outside of the subject matter that was called forth by the examination in chief.

To which ruling the defendant, by his counsel, then and there, at the time, duly excepted.

Mr. LEHMANN: I do not wish to do more in any of these matters than simply present it.

The COURT: You are entitled to present any matter, Mr. Lehmann. You have a right to do so.

Mr. LEHMANN: I do not want to repeat unnecessarily the same question.

Q. In some of the letters or telegrams you identified, there were references to some books; books that had been turned over to the Post Office Inspectors here, and which you wished to get back.

Now as to that, I wish to ask you what books those were?

Mr. LEHMANN: My purpose is to show they were not the books of the Rialto Grain & Securities Company.

The COURT: You may ask that question.

Mr. LEHMANN: I believe there is no controversy about it, and I will put it in leading form.

The COURT: Make a statement of what it was.

(Mr. LEHMANN resuming):

Q. The books that are referred to and with respect to which Senator Burton was asked to see the Inspectors or others at
236 Washington, were the books of the Brooks Brokerage & Commission Company, pertaining to its business, and were not the books and records of the Rialto Grain & Securities Company?

A. That is correct.

Q. They had passed into the custody of Major Dennis because he had bought out the Brooks Brokerage & Commission Company, or had bought out Brooks stock?

A. Yes sir.

Q. And they had been delivered by him to the inspectors?

A. To the Postoffice Inspectors.

Q. They had been used on the trial under the indictment?

A. Yes, sir.

Q. And after that he wanted to get the books back?

A. Yes, sir.

Mr. LEHMANN: The date of the trial I think can probably be better shown by other means.

Q. Did you say during the period from November until the time in January that the Dennis case was tried, you had any conference with Mr. Burton with respect to that case?

This question is objected to by counsel for the Government.

Objection is sustained.

To which ruling the defendant, by his counsel, then and there, duly excepted.

Mr. LEHMANN: I think under the ruling of the Court, as to the scope of the cross examination, I have nothing further that would not come within that ruling.

237 Redirect examination.

By Mr. DYER:

Q. You were asked about letters that were exhibited to you yesterday, and the fact that they were surrendered to the Government, or to its officers, by this defendant: When did you first see in the possession of the United States Attorney the letter of December 9, 1902, that of January 19, 1903 and February 11, 1903, written by Mr. Burton?

A. The day I handed them to you in the Grand Jury room. I don't know the exact date, but that is the first time I ever saw those letters in your possession.

Q. Do you know from whence those letters came into my possession.

A. I handed them to you.

Q. Did you before the Grand Jury produce those letters together with the letters that you had yourself written to Burton?

A. Yes, sir.

Q. Those letters were produced by you on a subpœna issued to you, to appear before the Grand Jury and testify, were they not?

A. I don't know. My recollection is you telephoned me.

Q. Whether by subpœna or request——

A. By request; I don't remember the subpœna.

Q. ——you presented those letters to the Grand Jury?

A. Yes, sir.

Q. Now were any of those letters, to your knowledge, obtained from the office of the Circuit Attorney of this city, Joseph W. Folk?

238 Mr. LEHMANN: I submit that it is wholly immaterial.

Mr. DYER: This witness has been asked when they were turned over to Burton, and Burton voluntarily surrendered them to the District Attorney. I want to show when these letters came and when he surrendered them.

The COURT: If there is to be a point made, and there seems to be by the cross examination, that the letters were surrenderd by the entire volition of the defendant, the prosecution has a right to go into that. The objection, therefore, will be overruled.

To which ruling the defendant, by his counsel, then and *and* there at the time duly excepted.

A. None of the letters I handed you were.

Q. Was this letter of February 11, 1903, addressed to you by Burton, so obtained?

A. I could not say. I did not note the letters individually. I handed them to you in the bundle, all that I had.

Mr. LEHMANN: I believe there are two.

Mr. DYER: I am talking about three letters, but I am asking particularly now about one.

Mr. LEHMANN: We had that all covered by agreement.

Mr. DYER (resuming):

Q. After these letters were produced in the Grand Jury room, that was before the indictment of Burton.

A. No, sir, that was after the indictment of Burton.

Q. Were not those letters, after they were placed in evidence before the Grand Jury, placed in my keeping; and was there not a stipulation that they might be used and read in evidence in this case; and, subsequently to that time the letters were given back
239 into your possession, or Judge Krum's to be examined by Burton?

Mr. LEHMANN: I submit the stipulation between Judge Krum and the District Attorney is something this witness had nothing to do with.

The COURT: He may have known about it.

A. I know there was a stipulation, but I don't know when the stipulation was made. I also remember, since thinking it over last night, I do remember I got those letters from you after they had been used in the Grand Jury room; and I took those letters to my office, then in the Rialto Building; and my recollection is that Senator Burton looked over them, and then I brought them back to you. Now I could not think of that yesterday, but I did think it over during the night, and that is the best of my recollection on that.

Q. Then so far as these letters are concerned, the letters were first presented to the Grand Jury, and after that they were obtained by you from me, and you showed them to Senator Burton: Is that true?

A. That is my recollection, yes, sir.

Q. And after, by showing them to you, I having had them before, they were subsequently returned to you: Is that true?

A. Then I returned them to you, yes, sir.

Q. Then so far as any voluntary giving up of those letters, prior to any examination, that is not true?

Mr. LEHMANN: I submit the witness did not state anything about "voluntarily." I simply asked him if he did not get the letters from Judge Krum.

The COURT: My recollection is, you used the very word "voluntarily" as applied to the surrender by the defendant of these
240 letters.

Mr. LEHMANN: I think not, in any question asked.

The COURT: I think so; but I may be mistaken about it.

Mr. LEHMANN: The form of the question is objectionable otherwise. It is not for the witness to state whether a question is true or not.

The COURT: He has already answered a question for you, and they may question him in respect of that same matter.

The previous question is here read by the stenographer.

The COURT:

Q. Did the original production of these letters at the instance of the prosecution, involve any element of volition on the part of

Senator Burton or not—the original production of them on your part? Was he consulted about that?

A. He was not. I got them from Judge Krum, and brought them from Judge Krum's office to the Grand Jury room.

Q. In the first instance?

A. Yes, sir, in the first instance.

Q. Was Judge Krum his counsel at the time?

A. Judge Krum was his counsel.

Mr. DYER (resuming):

Q. Had you submitted the letters to Judge Krum after you were requested to appear before the Grand Jury?

A. No, sir, I went right over and got them.

Q. You went right over and got them?

A. Yes, sir.

Q. Then whenever Judge Krum got hold of these letters again it was after the indictment had been found against Burton?

A. No, sir, it was before, my dear Colonel.

241 The COURT: The witness has testified that when he first produced the letters, he did it by getting them from Judge Krum, who was then counsel for the defendant. Pass to some other matters.

Mr. DYER (resuming):

Q. You stated upon inquiry being made of you, that Major Dennis owned a majority or a large majority of the stock of the Rialto Grain & Securities Company?

A. Yes, sir.

Q. Did you prepare the articles of association for Dennis?

A. I did.

Q. At his instance?

A. Yes, sir.

Q. Was there ever a share of stock issued to anyone by the Rialto Grain & Securities Company?

Mr. LEHMANN: That is objected to as wholly immaterial, as to whether a share was ever issued. It exists just the same. The certificate is mere evidence. I can own shares without holding a certificate And, moreover, I submit under the ruling of the Court that would not be competent in any event, on either side of the case. My inquiry was not as to the fact, but as to a conversation.

The COURT: The inquiry in this case should not be unduly broadened. We should not engage in what is known as the trial of any foreign issue. For that reason, at a very early stage of the case it was said that the question to be tried here was not whether or not the Rialto Grain & Securities Company was actually making fraudulent use of the mails, but whether or not there was a proceeding before the Postmaster General, or before the Postoffice Department. That is the question.

242 And then, latter, it was said that the proceedings or actions of different officials connected with the Post Office Department, after the transactions claimed to have been had by the

defendant, were all ended, could not be inquired into. I think we may not now inquire whether Major Dennis was a stockholder in the Rialto Grain & Securities Company, or whether he owned all the stock, or only a part of it, or whether any shares had ever been issued. That does not tend to reflect a bit of light on the question whether or not this defendant agreed to render for compensation the service named in the indictment, nor whether or not he did receive compensation for the services named in the indictment. That is the question we are trying in this case, and those issues should not be confused by going into some foreign issues.

Mr. DYER:

Q. In your conversation between St. Louis and Chicago, on the 17th of November, 1902, was there anything said in the course of that conversation about submitting the literature that was or might be published by the Rialto Grain & Securities Company to the defendant, for his examination?

A. I don't remember whether there was or was not.

Q. Did you tell him, in the course of that conversation, that as counsel for the Company you were supervising the matter that went through the United States mails?

A. I did not use as broad a term as "supervising it." I said their literature was submitted to me, and I examined it before it was allowed to go to the printing office; and that I did not hesitate
243 to blue pencil it unmercifully, if occasion required. That is what I told Senator Burton.

Q. Why did you tell him that you used a blue pencil unmercifully upon any of his literature?

Mr. LEHMANN: That is objected to as not competent; the only question on re-examination can be as to what actually occurred there.

The objection is sustained.

Col. DYER: I will withdraw that question, and put it in a different form:

Q. What was said by you, if anything, to the defendant, in reference to the character of literature that was being issued by the Rialto Grain & Securities Company, in that conversation?

A. As near as I am able to remember, I made that statement to Senator Burton in explaining to him that my duties, a part of my duty as counsel of this Company.

Q. Then you asked him to become associated with you as counsel for the Rialto Grain & Securities Company?

A. Yes, sir.

Q. You left here, as you have stated, on the morning of the 17th of November, 1902: Had you ever seen Mr. Burton before that morning?

A. I had not.

Q. At whose instance did you make that trip?

A. At the instance of Major Huch C. Dennis, the President of the Rialto Grain & Securities Company.

Q. Now after the whole of that conversation was concluded, between here and Chicago, you told Mr. Burton that you would submit

the proposition of Five Hundred Dollars a month made by
244 him, to Major Dennis when you got back?

A. I don't remember that I put it in that form. I told him that I had no authority, or felt I had no authority to conclude anything. But that I would take it up with Major Dennis upon my return.

Q. Then, what did he say to that?

A. I don't remember that he said anything, except to indicate that that was necessary, he understood it, and it was satisfactory.

Q. Had you promised him in that conversation, to wire him the result of this surmission, to Washington on the following day?

A. I don't remember a single thing as to that.

Q. At any time during any of your talk, did you send any of that literature to Burton?

Objected to by counsel for defendant as incompetent.

The COURT: You mean sent some of it to him at some other time?

Mr. DYER: Yes, sir.

The COURT: That does not relate to anything that was gone into in the previous examination.

Mr. DYER (resuming):

Q. Was there anything said in that conversation about submitting the literature to Mr. Burton?

A. As I say, I have no recollection of that. I have thought these things over, and have tried to recall; and I absolutely have no recollection of anything being said on that subject. I am not prepared to say whether it was or was not; but so far as my memory goes, which is my only guide, I absolutely cannot say.

245 Q. Do you recollect telling him in that conversation that you overlooked that literature yourself, as attorney, and that you would send the literature to him for his supervision?

Mr. LEHMANN: I think that the witness has answered fully as to that, that he had no recollection.

The COURT: The witness may answer.

A. I must answer again, that I have no recollection on that subject.

Q. Do you know how it came that Kastor went along with you and Burton that day? You said that Kastor went?

A. No, sir, I do not. He just simply went along.

Q. Did he come back with you?

A. He did.

Q. Was he present at this conversation you had?

A. He was.

Q. Did he take part in the conversation?

A. He did.

Q. Was there anything said in the conversation between Senator Burton and yourself in the presence of Kastor, about the Weltmer case?

A. Now I am not able to state that, whether there was or not. Sometimes I think there was, and then again I am in so much doubt

about it, that I really cannot say. I don't know whether I knew of the Weltmer case then or not. I knew of the Weltmer case, but whether I had acquired my information at that time, or a subsequent date, I am perfectly unable to tell; and that confuses my memory so that I cannot say at this time whether there was any talk
246 about the Weltmer case in this conversation with Senator Burton.

Q. Did not Kastor say to you and to Burton, in the course of that conversation, that Burton's familiarity with the Weltmer case would be of service to the Rialto Grain & Securities Company?

A. I cannot say whether he said that or not. If he said that, I don't remember it; but I do not mean to say he did not say it.

Q. Do you remember of anything being said with reference to the Weltmer case, in reference to that case being a case based on a fraud order issued by the Postmaster General, in that conversation?

A. As I say, I don't know whether I got my information of the Weltmer case before or after that; or whether it was mentioned. I know of the Weltmer case, but I don't know whether I got it then or before that.

Q. You mentioned something in your direct examination about this securities part, and what you explained to Senator Burton. I will get you to state to the jury whether with reference to that anything was done under that arrangement with Senator Burton, by him?

A. No, sir.

Mr. LEHMANN: I am perfectly willing that he shall go into the fact, if I can re-examine him with respect to it. But that does not grow out of my cross examination, limited as it was; but if I may re-examine with respect to this, I have no objection. If I should be precluded, however, from re-examination, that question is certainly not competent upon re-direct examination.

247 The COURT: The cross-examination on your part, went (that was evidently its purpose) to what were the terms of the agreement. It was intended that that examination should be directed to eliciting from this witness his statement as to what the terms of the agreement were.

Mr. LEHMANN: Yes.

The COURT: He said there were certain terms of the agreement in respect to securities. I understand that what is now asked of him is whether or not, subsequent to that time, there was ever anything done by the defendant with the securities part of the Company, with respect to that branch of the agreement. Evidently the question is asked as bearing upon the credibility or accuracy of the statement that that was part of the agreement. I think the interrogation is proper.

Mr. DYER (resuming):

Q. Have you stated fully all that you recollect as having occurred on that trip to Chicago on the 17th day of November, 1902, with reference to the matter of the Rialto Grain & Securities Company?

A. Yes sir, as near as I can recall.

Q. You said that this Brooks Brokerage Company was being con-

ducted by Brooks until June of 1902, and then sold out to Dennis: Is that true?

A. Yes, sir.

Q. What time did the Brooks Brokerage Company cease to do business, with reference to the time when the Rialto Grain & Securities Company was organized?

248 A. About the same time. Maybe I can state it a little more accurately. My recollection is, that the Rialto Grain & Securities Company was chartered on the 5th day of September and my recollection is, that the business of the Brooks Brokerage & Commission Company was closed on the 11th day of September. That is my recollection.

Q. Now up to the time of the closing of the Brooks Brokerage & Commission Company, and the commencement of business by the Rialto Grain & Securities Company, had there been, to your knowledge, any investigation by the Post Office Department of the Brooks Company?

A. I do not quite understand the question.

Previous question is read to the witness.

Mr. LEHMANN: That seems to be immaterial here. There is not any question but that there was an investigation at some time, and that there was an indictment returned as a consequence of it. I assume there is no question about it, because I know it is a fact.

Mr. DYER: I am not asking about what happened afterwards, but what happened prior to September.

Mr. LEHMANN: I think it is immaterial.

The COURT:

Q. Did you, in your conversation on the train with Senator Burton, make any statement to him in respect of prior investigations that had been had at the Post-office Department of the Brooks Brokerage & Commission Company, or of a threatened or impending investigation?

A. Yes, sir, I did. I went over that fully with him.

Mr. DYER:

Q. I will ask you whether in that conversation you told him there had been any investigation of the Brooks Brokerage & Com-

249 mission Company, during the active life of that Company?

A. I did.

Q. Did you tell him that an examination had been made by the Post-office inspectors of the Brooks Brokerage & Commission Company, prior to the organization of the Rialto Grain & Securities Company?

A. No, sir, because that was not a fact.

Q. That is what I am asking about, and what my question meant before.

Mr. DYER:

Q. I ask you if in that conversation you stated to him that there had — an investigation of the Brooks Brokerage & Commission Com-

pany by the Post office Department, prior to the organization of the Rialto Grain & Securities Company?

A. No, sir.

Q. You say that in that conversation you told him that this Rialto Grain & Securities Company was doing a large business, and that its deposits amounted to one hundred and twenty-five thousand dollars, I believe you stated?

A. One hundred and twenty thousand dollars.

Q. One hundred and twenty thousand dollars?

A. That is my recollection.

250 Q. Did you state to him in that conversation what money that was, thus deposited with the Rialto Company, and by whom?

A. No, sir, I told him that the Rialto Grain & Securities Company had on deposit in banks in the City of St. Louis the sum of one hundred and twenty thousand dollars.

Q. Did you explain to him and tell him that that was money of the Rialto Grain & Securities Company as such, or did you tell him that it was the money of people who had sent their money for investment: Did you tell him anything of that?

A. I think I have related the full conversation. I said the Rialto Grain & Securities Company had on deposit with these various banks, the sum of one hundred and twenty thousand Dollars.

Q. Did you tell him in that conversation that the principal business of the Comp-ny was done through the United States mails?

A. I don't know that I said that in so many words, but that, undoubtedly, was made plain.

Q. You say that was made plain?

A. Undoubtedly. I am not able to recall the words, but in describing the business of the Rialto Grain & Securities Company, I explained to him that it used the mails very extensively. I explained to him that the Rialto Grain & Securities Company had a capacity of getting out several thousand letters a day. Now I don't remember just what was said in that respect, but that was gone into fully.

Q. Did you say anything to him in that conversation about the remittances that were sent to the Company through the United States mail?

A. You mean——

251 Q. Whether the business of the Company, whether the money that came to the Company came through the United States mail?

A. Not just in that way. I did not say the Company got its money through the United States mail, but in explaining the manner in which the Company did its business it was necessarily made plain that the Company did get a great deal of money through the United States mail.

Q. You do not recall the exact words?

A. No, sir, I do not.

Q. But you are trying to give just what did happen?

A. Yes, sir.

Q. How did he come to ask you the question which you say he asked you "How are you going to avoid trouble with the Postoffice Department;" and what did he say in that connection?

A. Now as I remember that, we had been discussing this Brooks Brokerage & Commission Company, and he said "Now with your Rialto Grain & Securities Company how are you going to avoid any similar difficulty, any trouble, with the Postoffice Department, with your Rialto Company." Now that is the way I remember that was kind of sandwiched in there.

The COURT:

Q. Did you have any of this advertising matter with you, that you speak of, at that time, that he examined or spoke of?

A. No, sir, I did not have anything.

Recross-examination.

By Mr. F. W. LEHMANN:

Q. You were asked by Col. Dyer whether, in fact, this securities feature that you had talked about on the train with Sena-
252 tor Burton was carried out subsequently, and you answered it was not, as I recall your testimony. Why?

A. Because of an unexpected and unfortunate run of events.

Q. What were they?

A. First the indictment of Major Dennis, as the result of the inquiry into the Brooks matter. That was on the 29th of November that he was arrested. After that we devoted our time to the preparation for the trial of Major Dennis, and he was in no state of mind to consider this feature of the business, which I had explained to Senator Burton. After the trial of Major Dennis there was an investigation by the State Grand Jury of the affairs of the Brooks Brokerage & Commission Company; and then in February there was an investigation by a Legislative Committee of the Rialto Grain & Securities Company, and also a Grand Jury investigation; and the breaking down completely of Major Dennis, which resulted in his being taken to California.

Q. When you speak of his breaking down, you mean his breaking down in health?

A. Yes, sir.

Q. I am not asking you of course, as an expert, but was that very pronounced? That is, was it serious?

A. He had a total lapse of mind.

Q. That is what I meant; he had a total collapse of mind. I am not asking you as an expert. I believe there is no question about it. That, I believe, is admitted.

A. That occurred in the early part of February, 1903.

Q. And how long was it before Major Dennis came back
253 here and resumed his——

A. He did not return here until the 27th or 28th of July of 1903, the same year.

JOSEPH P. CARR, a witness of lawful age, being duly produced, sworn and examined, on the part of the United States testified as follows, to wit:

Direct examination.

By Mr. D. P. DYER:

Q. What is your name?
A. Joseph P. Carr.
Q. You live in the city of St. Louis?
A. Yes, sir.
Q. How long have you lived here?
A. All my life.
Q. In March, 1903, what was your business?
A. I was employed as a clerk by the Rialto Grain & Securities Company.
Q. Do you know the defendant here?
A. By sight, yes sir.
Q. When did you first see him to know him?
A. I cannot recollect the date, but it was prior to March; sometime in the spring of 1903. He was pointed out to me in the office, one of the offices, of the Rialto Grain & Securities Company as Senator Burton.
Q. You recognize this defendant as the man you saw there at that time?
254 A. Yes sir.
Q. When did you next see him after his being pointed out to you on the occasion you now referred to?
A. The next time I saw him was on that day in March when——
Q. The 26th of March?
A. Yes sir.
Q. Where did you see him that day?
A. I saw him in Mr. Mahaney's office.
Q. You may state where that was?
A. In the Rialto Building, on Fourth and Olive St-. a separate office entirely cut off from the other offices; a private office for the President.
Q. I show you a check, together with the stub of that check, dated March 26th, 1903, and ask you to state whether you wrote the body of that check?
A. (After examining check.) I did.
Q. By whom is it signed?
A. W. D. Mahaney, Vice-President; countersigned A. D. Hardie, Secretary.
Q. Was Mr. Mahaney at that time vice-president of the Rialto Grain & Securities Company?
A. He was, and in charge.
Q. What did you do with that check after you wrote it?
A. I sent it to the bank to get the money on it.
Q. Did the Rialto Grain & Securities Company at that time have an account with the Mechanics' National Bank of St. Louis?

A. Yes sir.

255 Q. And you got the money on that check?

A. I sent a boy from the office who got the money on the check, and he brought the money back to me.

Q. After you had received the money that you obtained on this check, what did you do with it?

A. Under Mr. Mahaney's instructions, when he told me to draw the check, I took the money into his office.

Q. Who was present in his office when you took the money in there that had been drawn on this check?

A. Mr. Mahaney and Senator Burton.

Q. After delivering the five hundred dollars to Mr. Mahaney, did you remain to see what was done with the money?

A. I did not.

Mr. DYER: I offer this check in evidence.

The COURT: There is no need of encumbering the record with that check. The witness has testified that on that check was obtained, through the instructions of one of the officers of the company, five hundred dollars of its money; that he took it into the Vice-President's office, and delivered it to him, in the presence of the defendant.

Mr. LEHMANN: I would like to have this check and the stub go into the record, especially the stub.

The COURT: For what reason?

Mr. LEHMANN: I want to show that this check was on account of payment of salary, and the stub shows it was on that account.

The COURT: If you wish it, it may go in.

256 Read both the check and stub.

Counsel for the government here reads the check and stub identified by the witness, which are in words and figures following, to-wit:

"The Mechanics' National Bank of St. Louis.

No. 214.

ST. LOUIS, *March 26th*, 1903.

Pay to the order of Cash $500.00 (Five Hundred) Dollars.
W. D. MAHANEY, *V. P.*

(Stamped) $500 Cash A. D. Hardie.
(Endorsed on back, in pencil) Sam Withall.

The stub is in the words and figures following, to-wit:
No. 214
Date 3 / 26 1903
Order of J. R. Burton $500 Salary
(Stamped)
Entered
(In pencil) 1 / 5 / 03 2 / 16 / 03

257 W. D. MAHANEY a witness of lawful age, being duly produced, sworn and examined, on the part of the United States, testified as follows to-wit:

Direct examination.

By Mr. D. P. DYER:

Q. State your name, if you please?
A. W. D. Mahaney.
Q. Were you at any time connected with the Rialto Grain & Securities Company of this city?
A. Yes sir.
Q. From what time?
A. From September, 1902, until August, 1903.
Q. Do you know the defendant, J. R. Burton?
A. Yes sir.
Q. When did you first become acquainted with him?
A. In December, 1902.
Q. Where?
A. At the Willard Hotel, Washington, D. C.
Q. In company with whom?
A. With Major Dennis and F. B. Wicks.
Q. When, after that time, did you see him again?
A. December 24, 1902.
Q. Where did you see him then?
A. In the office of the Rialto Grain & Securities Company, at Fourth and Olive Sts.
Q. I will get you to state whether or not you saw him in the offices of the Rialto Grain & Securities Company on the 26th of March, 1903?

258 A. I did.

Q. State whether or not at that time you delivered to him any money?
A. I did.
Q. From whom did you get the money?
A. From Mr. Carr.
Q. The last witness who was on the stand?
A. Yes sir.
Q. What did you do with that five hundred dollars?
A. I gave it to Senator Burton.
Q. On the 26th of March, 1903, in the city of St. Louis?
A. Yes sir.
Q. Had you any conversation with him at that time with reference to the business of the Rialto Grain & Securities Company at Washington?
A. Yes sir.
Q. State what that conversation was, as nearly as you can.
A. I said to Senator Burton that as far as I knew there was nothing pending in the department there; that the company was in good standing. Shall I continue?
Q. Yes.

A. And that inasmuch as Congress had adjourned, and there was no occasion for his services there, and, furthermore, it became necessary for us to reduce expenses, that I thought he would see the justice of discontinuing this particular charge He agreed to this immediately.

I said that if at any future time the company needed his
259 services, we might communicate with him at his home in Kansas.

Q. What further took place there in that conversation that day?

A. In relation to the standing of the company, you mean?

Q. In relation to anything.

A. Why, Senator Burton asked me if I had any correspondence of his. I found I had two letters, and we looked them over and I think the Senator said, "These are of no particular consequence, but inasmuch as my name was unfortunately connected at one time with the National Securities Company, it is just as well not to have these things in existence; if they fell into unfriendly hands they might possibly be misconstrued, although there is nothing in them that appears irregular, and with your sanction they had better be destroyed." I destroyed those two letters.

Q. At what time did you destroy those two letters?

A. On the occasion of that visit on March 26th, after the money had been paid.

Q. Were they destroyed in his presence?

A. Yes, sir.

Q. How were they destroyed?

A. I tore them up and put them into the waste basket.

Q. What further, if anything, took place there at that conversation, about matters at the Department? I mean always when I use the word "Department" the Postoffice Department at Washington.

A. I don't recall anything just now, except that the Senator
260 agreed with me that there was nothing dangerous, of a dangerous character, pending at the Department.

Q. Did he state anything as to how he knew?

A. I don't recall whether he did or not at that time.

Q. Did you have any correspondence with Senator Burton by letter or telegraph?

A. Yes, sir.

Q. I show you a paper dated 2/11/03, and ask you to look at that and state what that is?

A. (After examining paper.) This is a telegram which I sent to Senator Burton in relation——

Mr. LEHMANN: It will speak for itself.

Mr. DYER:

Q. State whether or not it was a telegram you sent?

A. A telegram I sent to Senator Burton at Washington.

Q. Had you seen, prior to sending that message, this one of the same date?

A. (After examining paper.) I had seen this.

Q. Will you state whether this dispatch which you sent on that day had reference to the dispatch which you now have in your hand?

A. Yes sir, it was on that subject.

Mr. DYER: I offer these two telegrams in evidence.

Mr. LEHMANN: There is no objection.

Counsel for the government here reads in evidence the telegrams referred to, which are in the words and figures following:

261 Western Union Telegraph Company

Received at 412 & 414 Pine St., St. Louis Mo.
Telephones: Main 246; Kinloch, 520 Standard time

1677

30w h is 86 Paid Govt.

— ST., WASHINGTON, D. C., *Feb.* 11, '03

Thomas B. Harlan, care Rialto Grain & Securities Co., Rialto bldg., St. Louis, Mo.:

S. M. McGowan is Indian Agent at the place named but Dept. had telegram from him yesterday which indicates that yesterday he was in the Territory Indian Commissioner will wire today to see if McGowan is in St. Louis and will make inquiry of him why he is taking such proceedings. Message though signed by him may have been signed by his clerk. Dept. has great confidence in the real McGowan.

J. R. BURTON.

1253 p. m.

Hon. J. R. Burton, Washington, D. C.:

Discontinue investigation. Matter settled amicably.

W. D. MAHANEY.

Paid. Rush.

262 Q. Now I will get you to state what that was, Mr. Mahaney?

Objected to by counsel for defendant as immaterial.

The only competency I think it had in any event, because it does not relate to any matter in the Postoffice Department, is that it connects itself with the letter that the witness speaks of. He says one of the letters. I object to that.

The COURT: I recollect the matter.

Mr. LEHMANN: This witness having been produced here, and testified as he has, and having knowledge of what the further testimony is, I believe it to be competent for that reason, and only that. Not that we are interested in the McGowan matter itself. This witness will state that one of the letters he referred to was confirmatory of that telegram.

The COURT: Of course, I cannot know what particular testimony it is that is now sought to be elicited; but in view of the statements of one of the witnesses as to the character of the agreement, I am inclined to think this testimony has some bearing upon the practical

construction which the parties gave to their agreement later on; a very slight bearing, but some; and enough to carry it in. I will listen to some preliminary questions before I finally rule on the matter. But you may ask your question now.

To which ruling the defendant, by his counsel, at the time, then and there duly excepted.

A. McGowan claimed to have due him from the Rialto Grain & Securities Company an amount of money, and demanded an
263 immediate settlement of the exact amount he stated. I told him that we would investigate the merits of his claim——

Mr. LEHMANN: I submit the detail of that would not be competent in any event.

The COURT: You are right about that. You may ask what the transaction related to, and draw out anything that bears upon the service of the defendant, if there was any service in that connection.

Mr. DYER:

Q. I will get you to state why you telegraphed to Senator Burton.

Mr. LEHMANN: That I submit the telegram answered. The telegram explains itself.

Mr. DYER: May I explain.

The COURT: You may explain.

Mr. DYER: I may be a little awkward in getting at what I really want, and I beg your Honor's indulgence in that. This telegram, on its face, referred to a person employed by the Indian Department, and had reference to an investigation growing out of this claim, set on foot by the Department, and this answer I have read, signed by Senator Burton, is in reference to the person about whom they inquired as working for the Indian Department.

The COURT: Are you trying to connect that with something that occurred in the Postoffice Department?

Mr. DYER: I expect to.

The COURT: On that statement, the objection will be over-ruled, and an exception allowed.

Mr. DYER:

Q. I will get you to state what was the inquiry made at Washington concerning McGowan, and where?

264 Mr. LEHMANN: I do not know whether that is the same question. If not, I wish to object to it.

The COURT: You may be understood as having your objection and exception to all these matters.

A. McGowan proposed to act very arbitrarily in this matter, and would not allow any time for investigation of the claim, and threatened press *b*otoriety, and to take some legal steps here forthwith, not allowing me any time for investigation as to the merits of this claim. He threatened newspaper notoriety and claimed, as I recollect it, high standing with the government. In that emergency it occurred to me it would be a good thing to telegraph Senator Burton and ask

him to investigate this man and what his standing was, and if he was genuine. I don't know the exact tenor of the telegram that called forth this one to Mr. Harlan. The whole idea was that perhaps Senator Burton would be glad to help in the situation. Immediately, or almost—well within a few hours after that telegram was sent, and one received addressed to Mr. Harlan, I settled the matter with McGowan to his satisfaction, and then telegraphed to discontinue the investigation, that the matter had been settled.

Q. "To discontinue the investigation." What investigation did you have on hand at the time?

Mr. LEHMANN: That appears from the telegram. An inquiry at the Indian Department as to whether or not that man was an Indian Agent.

The COURT: You may answer.

Mr. DYER:

Q. You may state what McGowan represented himself as
265 being, and what he said he would do at Washington.

A. McGowan was very much excited, and he said he would put us out of business, through his various influential channels. But when he got over this excitement, the claim was settled.

Q. Why did you send to Senator Burton? That is the question.

A. Well, I cannot recall the exact motive. In a general way, matters pertaining to a serious situation I supposed ought to be submitted to him. That was probably my motive. I cannot recall it exactly at the time, because there was a great deal of confusion, and a great many claims. That telegram of his is addressed to Mr. Harlan, and Mr. Harlan may have dictated the telegram that inspired his reply. But in the meantime the matter had been settled by me, and knowing there had been some discussion about the matter, between either Senator Burton and me, or Senator Burton and Mr. Harlan, I sent that telegram that the matter was settled.

Mr. DYER: The original telegram that Mr. Harlan sent we have not. And for that reason, it being in reference to this matter, I suppose under that statement, supposing it had reference to an inquiry in the Postoffice Department, this inquiry was made. The government desires to withdraw the question as put. I supposed that had reference to that particular matter.

The COURT:

Q. Was there anything about the Postoffice Department in this matter or in this communication?

266 A. In relation to McGowan?

Q. Yes; specifically, I mean.

A. Not to my knowledge.

The COURT: I understood, Mr. Lehmann, awhile ago, that you said the two telegrams might be read in evidence.

A. The telegrams themselves, for the reason that I stated.

The COURT: All of the evidence delivered by this witness since the

with-drawn, because it has not been in any way connected with the Postoffice Department, or in any way connected up, so that it could have a legitimate bearing on this case, or could be properly considered.

Mr. DYER:

Q. I show you a paper dated Feb. 2, 1903, and ask you if you sent that to Washington?

A. (After examining paper). Yes sir, that is mine.

Mr. LEHMANN: Objected to as immaterial and irrelevant, not pertaining to this case.

The COURT: Have you offered that in evidence?

Mr. DYER: No sir. I simply asked him to identify it.

Mr. LEHMANN: I beg your pardon; I thought you had.

Mr. DYER:

Q. I show you a message of the 17th of December signed, "J. R. Burton." Did you receive that, and the next one following did you answer?

A. (After examining paper). Yes sir, I received this message, and the next one is the answer to it.

Mr. DYER: I offer in evidence that message and the answer.

267 Mr. LEHMANN: That I object to. There is no question as to what they relate to. A check had not been sent for one of the intervening months, and Senator Burton inquires for it. I submit that it is not competent here. The agreement has been shown.

The COURT: It is not necessary to encumber the record with this.

Mr. DYER: I want to ask what this meant. It does not say, "Send check."

Mr. LEHMANN: We know that is what it means.

Mr. DYER: I don't know what it means. I want to ask this witness what it means.

The COURT: Don't you know what the answer will be?

Mr. DYER: I suppose what the answer will be. But there is something to be drawn from the wording of this message, an inference to be drawn from the wording of this message, that would not be drawn if the check or money was mentioned in the paper.

The COURT: The Court will not accede to your contention that there is an inference to be drawn, but will permit the matter to go to the jury, so that if there is any inference which should rationally be drawn, they may draw it. The Court does not let it go to the jury with the idea that they should draw an inference, but with the idea that they shall determine whether or not, with all the other evidence bearing upon the question, there should be some inference drawn.

You may read the telegram and its answer.

268 Counsel for government here reads the telegram referred to, which is in the words and figures following, to-wit:

Western Union Telegraph Company.

Received at 412 & 414 Pine St., St. Louis, Mo. Standard Time.
1401

4018 CH OP HS 20 Paid Govt.

— St., Washington, D. C., 17.

Mr. W. D. Mahaney, Rialto Bldg., St. Louis, Mo.:

Did you send paper Saturday it has not arrived.

J. R. BURTON.

Counsel for government here reads the reply to telegram referred to, which is in the words and figures following, to-wit:

2/17/3.

Hon. J. R. Burton, Washington, D. C.:

Was called away unexpectedly Saturday. Forgot to mail paper. It was sent to you yesterday.

W. D. MAHANEY.

269 Mr. Dyer:

Q. What paper was sent to Burton?
A. A check for Five Hundred Dollars.

The Court:

Q. Was that one of the checks for a month's pay, which have been introduced in evidence?
A. Yes sir.

Mr. Dyer: I offer in evidence the check.
Mr. Lehmann: That is objected to.
The Court: I thought you offered those yesterday.
Mr. Dyer: I only read two of them in evidence yesterday.
The Court: You may read it, if that is the case.
To which ruling the defendant, by his counsel, then and there, at the time, duly excepted.
Counsel for the government here read the check referred to, which is in words and figures as follows, to-wit:

Rialto Grain & Securities Co. (Incorporated).

No. 2083.

General Offices: Rialto Bldg., St. Louis.

$500. St. Louis, Mo., *Feb'y* 16, 1903.

Pay to the order of J. R. Burton $500.00 (Five Hundred Dollars).

Commonwealth Trust Company, St. Louis, Mo.

RIALTO GRAIN & SECURITIES CO.
By W. D. MAHANEY, *V. P.*

Countersigned:
A. D. HARDIE, *Sec'y.*

270 (Endorsed on back:) J. R. Burton, Pay Commercial National Bank, Chicago, or Order. The Riggs National Bank, of Washington, D. C. Arthur T. Brice, Cashier. Pay Franklin Bank, St. Louis, Mo., or Order. Commercial National Bank, of Chicago, Jos. P. Talbert, Cashier. 11. St. Louis Clearing House, March 3, 1903. Franklin Bank. (Perforated:) Paid.

Q. Was that the check concerning which this correspondence by wire took place?

A. Yes sir.

271 Q. I show you a paper dated the twenty-fifth of February 1903, and will ask you whether that is a copy of a message sent to J. R. Burton at Washington (handing witness paper)?

A. It is.

Q. Did you send that yourself?

A. I did, sir.

Q. Look at this paper and see whether this is an answer to this message (indicating)?

A. Yes, sir, that is the answer.

COUNSEL FOR THE GOVERNMENT: I offer these two telegrams in evidence in this connection, they are in words and figures as follows to wit:

"2/25/03."

Hon. J. B. Burton, Washington, D. C.:

Report to me to-day from apparently reliable source that two special inspectors have been appointed to investigate us and report to Post Master General. Please verify and advise at once.

(Signed) W. D. MAHANEY"

272 "WASHINGTON, D. C., *Feb'y 27th*, '03."

Mr. W. D. Mahaney, care Rialto Grain & Securities Co., Rialto bldg., St. Louis, Mo.:

No complaint in the Department against you. Will write full particulars by to-night's mail.

J. R. BURTON."

Q. I will ask you to state whether you received a letter from the Defendant of that date, written after that dispatch was sent?

A. I believe that I did.

Q. Have you got a copy of that letter?

A. I have not.

Q. Have you got the original letter?

A. No sir.

Q. Do you know what became of it if you received it?

A. My opinion is it was one of the letters which I destroyed.

Q. That is to say, one of the letters that you destroyed on the twenty-sixth of March 1903, to which reference was made?

A. Yes sir.

Q. Have you stated all that occurred between the Defendant and yourself at the time you paid him the five hundred dollars in the

manner you have indicated, on the twenty-sixth of March. Have you stated it all, substantially, all that was said there at that time?

A. Why, I don't know whether I said that hardly—after I paid him the money Mr. McRea came into the office, and I introduced him to the Senator. I think that was the first time Mr. McRea had met him, and I stood by hearing the general conversation that, for the time being at least, we—that his services were discontinued. We talked generally of that matter.

273 Q. Of what matter?

A. Of the matter of his services being dispensed with for the time being, and he expressed a willingness to serve the Company in the future if it became—or seemed advisable.

Q. That took place in the presence of Mr. McRea?

A. Yes sir.

Q. What position, if any, did he hold in the Rialto Grain and Securities Company?

A. He was—he had the title of Comptroller.

Q. You were the Vice President of the Company?

A. Yes sir.

Q. I will get you to state whether the Company, to your knowledge, had any business at Washington other than business in the Post Office Department?

A. None, to my knowledge.

Cross-examination.

Mr. LEHMANN:

Q. Mr. Mahaney, the President of this Company was Mr. Hugh C. Dennis—sometimes called Major Dennis—was he not?

A. Yes sir.

Q. I think you stated that—or it has been stated here—that you were in charge of the Company's affairs, for a time. How long were you in charge of them at that time, in March?

A. I had been acting in his place since sometime in February.

Q. That was because Mr. Dennis had broken down in health, mentally and physically?

A. Yes sir.

Q. And had been taken, I believe, to California?

A. That is correct.

Q. And, at this time, had not recovered, and was not yet back in the business of the Company?

274 A. Yes, that is correct.

Q. That is correct, is it?

A. That is correct.

Q. You were not present at this meeting, or on this trip from St. Louis to Chicago that was taken by Mr. Harland and Mr. Burton?

A. No sir.

Q. And you have no knowledge, no personal knowledge, of what occurred there?

A. None.

Q. And you did not make the arrangement, whatever it may have been—with Mr. Burton?

A. No sir.
Q. And you have no personal knowledge of it?
A. None.
Q. Now, Mr. Mahaney you have referred to two letters; one, I think of date February twenty-seventh—the same date as the date of the telegram which was just shown you. What was that letter. Was that simply confirmatory of that telegram?
A. I stated that I believed that that letter was the one confirming the telegram.
Q. Simply confirming?
A. That is my recollection.
Q. In substance, it stated what the telegram stated?
A. Yes sir.
Q. Now, your attention was also called to a telegram which was addressed by Mr. Burton to Mr. Harlan with reference to Mr. McGowan, the Indian Agent, or the employee of the Indian Department. Do you re-call that?
A. I do.
Q. Now, the other letter was confirmatory of that telegram, was it?
A. That is my recollection of it.
Q. So that these two letters which you referred to as having been destroyed there, were, in substance, the same as the tele-
275 gram?
A. Yes sir, that is my impression.
Q. And, did Mr. Burton ask for any telegrams?
A. You mean from me?
Q. Yes.
A. No.
Q. Did he ask for any other letters than those two?
A. He only asked if I had any of his correspondence. I looked in the desk, and in the private file, and that was all I found.
Q. Now, at that time, you did most of the talking, did you not, that was done?
A. On the occasion of his visit there on the twenty-sixth of March?
Q. Yes.
A. Well I believe I did.
Q. In October, 1903, there was an indictment returned against you, was there not, and I believe against—well, I will confine it to yourself—in the United States District Court here, because of your connection with the affairs of the Rialto Grain and Securities Company?
A. Yes.
Q. And that indictment has never been brought on for trial?
A. Not yet.

The COURT: What is the purpose of the last two questions?
COUNSEL FOR DEFENDANT: I think it bears on the weight to be given to the testimony, and the situation of this witness with respect to the cause.

Redirect examination.

Mr. DYER:

Q. In that indictment that you have been asked about, it also included Dennis and Garland, did it not?

276 A. And my understanding Mr. McRea.

Q. And McRea?

A. Yes sir.

WILLIAM E. COCHRAN, having been heretofore duly sworn as a witness on the part of the United States was recalled to the stand and testified further as follows:

Redirect examination:

Q. You have been sworn in this case?

A. Yes sir.

Q. And you stated that in November, December, 1902, and January, February, and March, 1903 you held the position of Chief Post Office Inspector at Washington?

A. I did.

Q. I will get you to state whether the business of that office was under your entire supervision?

A. It was.

Q. Had you control of Inspectors, and complaints made to the Post Office Department?

A. I had, when they came to me.

Q. Had you the right, under—in your official position—to remove any Inspector from duty in any particular district?

COUNSEL FOR DEFENDANT: I don't see the relevancy of that or how it is involved here at all.

The COURT: What is the purpose of that.

COUNSEL FOR THE GOVERNMENT: I want to show that it was in his power to control any investigation, if there was one, and that that was part and parcel of his duties. However, I will withdraw the question and put another one.

Q. Had you, in your capacity as Chief Post Office Inspector, the right to designate any particular officer to make inquiry, or

277 to take any inquiries from the hands of one, out of the hands of that one, and put it in the hands of another?

A. I had.

Q. Mr. Cochran, you stated, I believe, that you know the Defendant?

A. I don't remember whether I stated it or not.

Q. Well, do you?

A. I do know him.

Q. How long have you known him?

A. Oh, a great many years, since back to eighteen eighty-three at any rate.

Q. I will get you now to state to the jury, whether at any time, this Defendant called upon you at your office in the Post Office Building

at Washington with reference to any complaints that had been, or lodged against the Rialto Grain and Securities Company during the period covered by my question, to wit: from November to April?

A. I did.

Q. Can you state now the date of that first visit that I now call your attention to?

A. I can't fix exactly the first visit.

Q. State what was said—state about when it was, if you know?

A. Well, it was after the case against this Company had been made up and sent out to St. Louis for investigation.

Q. Do you know how long after?

A. I do not.

Q. Can you approximate the time after?

A. Well from my personal recollection I possibly could not. I know, of course now, but whether I could have stated it if it had not been for the other questions brought out, I am not certain.

Q. Well, state from any information that you have now, obtained from records or otherwise; can you state to the jury what day of the month that visit was made to you?

A. Well, it was about ten days after the case was made up.

278 Q. State what conversation took place between himself and yourself with reference to these complaints?

A. He asked whether any complaints had been received, or any investigation was under way, with reference to the Rialto Grain and Securities Company, and I secured the information for him and gave it to him.

Q. What information did you secure at his request?

A. I told him that there was such a case, and gave him the name of the complainants on whose complaint the case was jacketed.

Q. You may state whether that information that you gave him was information that any one inquiring was entitled to?

COUNSEL FOR DEFENDANT: I submit the question is as to what occurred there, and that that question of right would be a question of law. I say the examination here should be as to what occurred there, simply as to what occurred; whether one person or another had the right to get that information I believe is a matter of law.

The COURT: I don't know what is intended by the question, but the witness may answer, having regard in doing so to the custom and habit which prevailed in his office at that time in those matters.

To which ruling of the Court Defendant, by Counsel, then and there duly *accepted*.

Q. You may answer the question.

A. I should have given to any one inquiring, probably, the fact that a case had been made up, but I should not have given to him the names of the complainants.

Q. Why did you give them to him?

COUNSEL FOR DEFENDANT: I submit—unless that was dis-

279 closed—that wouldn't be competent.

The COURT: He may answer the question.

To which ruling of the Court Defendant, by Counsel then and there duly *accepted*.

A. Because he was a Senator of the United States.

Q. What took place there at that time between you, and what was said in that conversation about the Rialto Grain and Securities Company if anything was said?

A. There was a general discussion as to the business of the Company, the Senator telling me that the Rialto Company was endeavoring to do a straight business, and that any trouble that they might be in was trouble about the old Company. The Brooks Brokerage and Commission Company and that the new Company was all right.

Q. Was that all that was said at that time, about the matter, to your recollection?

A. That was the substance of it, I think.

Q. Did you see him in the Post Office Department at any other time with reference to the Rialto Grain and Securities Company?

A. I did.

Q. When was that?

A. I can't fix the date of the next visit.

Q. How long after this occurred?

A. Well, it was probably within two weeks.

Q. Did he go to your office?

A. He did.

Q. Did you see him in your office?

A. I did.

Q. State what took place then?

A. He asked whether two persons, whose names he gave me, were Post Office Inspectors, and whether they were investigating these kicks against the Rialto Grain and Securities Company.

280 Q. Can you tell now the names or name of the person or persons he asked about?

A. No sir, I couldn't have stated that from my recollection of the matter.

Q. Do you recollect what you told him in answer to his inquiry about whether these were Post Office Inspectors, or whether they were inquiring as to the Rialto Grain and Securities Company.

A. I told him that they were not Post Office Inspectors.

Q. Was there anything said at that time, by him, with reference to the business, or the character of the business, that was being conducted by the Rialto Grain and Securities Company?

A. The Senator told me several times about—made the same statement I repeated—about the intention of the Rialto Grain and Securities Company to do an honest business, and keep out of trouble, but I can't recall definitely whether this particular time was one of them or not.

Q. When, if at all, did you see him after—if you saw him again after the time he made the inquiry of you about the Post Office Inspectors. When, after that, if at all, did you see him?

A. I think it was when he brought Major Dennis to my office and introduced him to me.

Q. Do you recall now about the time when that was?

A. Why, it was after the indictment of the officers of the Brooks Brokerage and Commission Company, and, to the best of my recollection was early in December 1902.

Q. State what took place at that time when he came there with Dennis?

A. The Senator said he wanted me to meet Major Dennis, and to see what kind of a man he was, and he also repeated the as-
281 surance that the Rialto Grain and Securities Company was endeavouring to do a straight business, and that all of the trouble with the Company was chargeable to Brooks.

Q. Did anything further take place there at that particular time that you can now recollect?

A. I can't state certainly whether or not he said at this time that he would never antagonize the Department, but would try to establish a harmonious relation between the Department and the person he was interested in. He did make that statement on several occasions. I can't say, as a matter of fact, whether he said this on this occasion or not.

Q. When, after that time, if at all, did you see him?

A. It was on the day which I sent the telegram to Mr. Dice, the Inspector in charge of this division.

Q. State what occurred at that time and if you have any data from which you can state the time, I will be glad if you will do so?

A. I think my record is in the file there probably (indicating papers on table).

Q. For the purpose of refreshing your memory (handing witness file of papers).

A. It was on the twenty-fourth of January, 1903. It was on the —I find that I was mistaken on that—it was on the twenty-third of January 1903. This was after the case against the officers of the Brooks Brokerage and Commission Company had been dismissed in the United States Court, and the Senator stated to me that, during the progress of this investigaion, a book, which I undersand now was a record of that Company, but which I supposed at the time was of the Rialto Grain and Securities Company, had been turned over to the Inspectors, and that Mr. Dice had, after this
282 trial was concluded, and there was no case pending in the United States Court, turned it over to the Circuit Court, or the Circuit Attorney of this City for prosecution in the State Courts. The Senator said that that was a breach of faith, and insisted that I should direct Mr. Dice to recover the book and to return it back to the persons from whom he secured it.

Q. Well.

A. I didn't see my way clear to take that action, and suggested to him, that if he wished I would submit the matter to my immediate superior, the Fourth Assistant Post Mast- General. That was done, and the same statement they made there, but he also declined to issue the order which was desired.

Q. When the statement was made, and submitted, were you with him at the Fourth Assistant Post Master General's Office?

A. I was.

Q. Now, state to the Court, what occurred before the Fourth Assistant Post Master General, as near as you can, when you went with this Defendant there?

A. There were practically the same statements made before him that were made to me

Q. Then what did the Fourth Assistant Post Master General do with reference to it?

A. He also declined to issue the order, and, my recollection is, that all three went to the Post Master General, but the Fourth Assistant and myself, I know, went there, and the matter was stated to him, and by his direction a telegram was sent to Mr. Dice by me.

Q. On what day was that telegram sent by you, by direction of the Post Master General?

283 A. My record shows it was on the twenty-third of January 1904.

Q. What time in the day?

COUNSEL FOR DEFENDANT: Do you mean 1903?

A. 1903, that is right.

Q. Do you recollect what time of the day this visit was made to you, and to the Fourth Assistant Post Master General, and to the Post Master General?

A. I should say it was in the fore noon.

Q. Have you stated all that occurred there at that time, upon that visit, as near as you now recollect it?

A. Everything except the telegram that I sent.

Q. Yes.

A. (Continuing:) As I re-call it.

Q. Now, after his submitting the case to you, and then to the Fourth Assistant Post Master General, and finally submitting it to the Post Master General himself, what action was taken with reference to that matter; and state whether you, in accordance with the directions of the Post Master General sent any message to Mr. Dice?

A. There is a statement that I will ask permission to make. I find I made a mistake. I mistook one of these telegrams for another, and gave the wrong date for the message that was sent by direction of the Post Master General. It was on the twenty-fourth, instead of on the twenty-third. I sent another telegram to Mr. Dice on the twenty-third, that I find here, and I mistook it to be that one.

Q. Well, you may read the dispatch you were directed to send Mr. Dice, after this visit of Mr. Burton to these offices.

284 A. "January twenty-fourth 1903 Dice Post Office Inspector in charge St. Louis, Mo. Representations are made to Department concerning Dennis case that to surrender certain papers voluntarily placed in your hands for a *spefici-* purpose would be a breach of faith. Please advise me. Cochran Chief Inspector."

Q. What representations do you have reference to in your dispatch to Dice?

A. The representations made by Senator Burton.

Q. At what time after that, if at all, did you see Senator Burton?

A. It was on the evening of the fifth of February, 1903.
Q. Where did you see him?
A. At his office in the Senate Annex, Maltby Building, in Washington.
Q. How did you come to see him then?
A. Colonel Smith called me on the phone and asked me to call on the Senator.
Q. Who is Colonel Smith?
A. Colonel Smith is Senator Burton's Secretary.
Q. State what time in the day on that day did you see him?
A. It was probably about five o'clock.
Q. Was there anyone in company with you at that time?
A. No sir, no one went with me.
Q. State what occurred. What was said at that interview on February—what?
A. Fifth.
Q. (Continuing:) February fifth, 1903, between Burton and yourself?
A. When I first went there Colonel Smtih and a lady were in the office, I don't think there was anything much said about this matter until after they had gone, but, then, the Senator told me that
285 he had received a message from a Mr. Harlan in St. Louis—possibly showed it to me—but, anyway, he told me that he had, and that he objected to the books being left with the Circuit Attorney here. He said that Mr. Harlan stated that the United States Attorney said he had no further use for the book, and insisted that it should be returned. I told him that I told him what I told him in the other case and over looked, that the people in St. Louis should take the matter up with the United States Attorney if they wanted to recover the book, and that the Post Office Inspectors here would be governed entirely by such instructions as he might give, but I promised at this time to send a telegram of inquiry to Mr. Dice, and I did send one the next morning.
Q. Well, have you got a copy of that?
A. Yes sir.
Q. The dispatch that you *send* to Dice in pursuance of this visit, this conversation you had with him, on the fifth of February?
A. I may have stated that was the fifth of March.
Q. Sir?
A. I may possibly have stated that was the fifth of March in my other, time, but I didn't intend to.
Q. Well, it was the fifth of February?
A. Yes, the fifth of February.
Q. All right.
286 A. "February 6th, 1903. Dice, Post Office Inspector in charge, St. Louis, Mo. Harland, Attorney for Dennis, wires Senator Burton that you have surrender- books to State authorities, and that they are held subject to your order; also states that United States Attorney says he has no further use for them. Please report fully all facts with your recommendations. Cochran, Chief Inspector.

Q. Was that dispatch sent to Mr. Dice as a result of the interview that you had with the Defendant?

A. It was.

Q. Was there anything else said in that interview between Senator Burton and yourself with reference to his appearing before the Department?

A. There was.

Q. State what that was?

A. After this matter had been settled, or arranged, the Senator said to me "Cochran, I want to continue to appear before the Department in this and other cases, because I can make some money in that way to apply on my old debts" he said he had lost very heavily in the panic, and that he had paid about seventy thousand dollars of debts for which he was not liable, but that he would never plead the statute to bar. He said there wasn't anything wrong in this; that a number of Senators—Senator Edmunds among them—had materially increased their income in this way, and that it was entirely proper.

Q. Was that all—about all that was said?

A. He said that if he ever overstepped the bounds he wished that I would tell him so.

Q. Was there anything said to him at that time, or, did he say anything to you at that time about the right of a Senator to appear before the Department for compensation?

287 A. No sir, he—he did say, however, that in all of these matters he would never antagonize the Department that his efforts would be directed to bringing about a harmonious adjustment of differences, and, even if he thought the Department was wrong in the action taken, that he would not oppose them.

A JUROR: I can't hear that.

The COURT: Just repeat your last answer, and try to speak a little louder.

A. He said at this time that he would never antagonize the Department, but that his efforts would be directed towards bringing about a harmonious adjustment of differences, and that he would not oppose the Department even though he thought the Department was wrong.

Q. What further, if anything, did he say about practicing before the Department in the Rialto and Securities cases, or any other cases, if any such thing was said?

A. I don't recall anything further.

Q. Have you stated fully all that he did say at that particular time?

A. As nearly as I can recollect it, yes sir.

Q. Now when, after that time, if at all, did you see him and talk with him about the business of the Rialto Grain and Securities Company?

A. It was on the evening of the day on which the first indictment of the Senator was made public in Washington.

Q. Do you recall that day, that date?

A. That, I think, was in March.

Q. What year?

A. I am not exactly—I cannot fix the date exactly from recollection.

Q. Yes.

A. It was in 1903.

288 Q. That was the date—

COUNSEL FOR DEFENDANT: Just a moment. Do you mean 1904?

A. 1904.

Q. 1904. How did that interview come about?

A. Col. Smith, the Senator's Secretary, called at my office in the Department and said that the Senator wanted to see me, and that he was very busy, and asked if I wouldn't call at his office. I told him that I would call, and I did call after the Department closed, in company with Mr. Vickery, who was at that time Post Office Inspector in charge of the Cincinnati division.

Q. Where did you see him?

A. I saw him in the Maltby Building, Senate Annex.

Q. Who was present at the time you were there?

A. Well, there was there, myself and Mr. Vickery, Col. Smith and the Senator.

Q. State what occurred at that time.

A. The Senator said that he wanted to talk matters over with me, that he didn't see where he could have violated any law. And I said to him "Senator, I think it is only fair to say to you, before this conversation proceeds any further, that I was a witness before the Grand Jury, and that I was sworn to secrecy as to what took place there, and that, in addition to that, the official proprieties would prevent my discussing the case with you." He said, however, that he would like to recite his recollection of the matter, and that his memory was good—that he had a good memory, and to go on to say that he didn't see wherein he could have violated any law. He

289 said that he appeared before the Post Office Department, and many other Departments in getting information, and that, if there was any wrong for him to go to the Pension Bureau and get information as to claims there, and make visits of that kind, of course, he would quit it, but he didn't understand that that was the case. He asked me what section of the law he was charged with violating, and told him that, according to my recollection, it was 1782, or 1781; I think I mentioned one or the other, but I told him I thought it was 1782. He asked me what the purport of that section was, and I told him it was very comprehensive and I couldn't undertake to recite it, but that in general terms it made it an offense for a Senator, or a Member of Congress to practice before the Department; but he said he had not been practicing before the Department.

Q. Before that part of the conversation was there anything said by him in this talk with you, as to the capacity in which he had appeared before the Post Office Departments?

A. Yes sir, he said that he had appeared as an Attorney for the Company.

Q. Well, what else took place there at this conversation?

A. The Senator reminded me that he had assured me frequently that he did not wish to antagonize the Department and I told him that that was so, that he had so advised me several times.

Q. Was there anything further, to your recollection, that took place there?

A. Well, there was quite a long conversation. He said that he had—that his employment was a profitable one, and he had been very glad to get it, or something of that kind. I think I have
290 stated the substance fully as nearly as I can re-call it.

Q. What did he say of the profitableness of the Rialto Grain and Securities Company to him as Attorney. You say he said something about the profit?

A. He said that he had been glad to get it. I can't recall exactly the statement he made in reference to that—that it was—he said that he had told them that he was no cheap lawyer, when the matter of price was mentioned.

Q. Well, is that about all that occurred there as you now recall it?

A. That is about all, yes sir.

Cross-examination.

Mr. LEHMANN:

Q. The first visit of Mr. Burton to your office was about November twentieth, was it not?

A. It was about that time. I couldn't fix the date at all without—

Q. (Interrupting.) But he called to see you, and his first inquiry was with reference to whether the Government intended to make a case against Major Dennis, was it not. Was not that what introduced the matter?

A. Why, according to my recollection, he inquired about the Rialto Grain and Securities Company, but he probably did mention Major Dennis, but I don't recall it distinctly.

Q. Well, you re-call the fact, shortly after, that there was a prosecution begun against Major Dennis?

A. Yes sir.

Q. Then he made the statement in that connection, did he not, that the trouble—and at that interview—that the trouble that Major Dennis was in had grown out of the Brooks Brokerage and Commission Company and not out of the Rialto Grain and Secur-
291 ities Company's business?

A. He did.

Q. So that, I think it was then a prospective case, the indictment had not been actually returned; but that was discussed there, this matter of Major Dennis—in that first interview—and that his trouble had grown out of the Brooks Brokerage and Commission Company's business and not out of the Rialto Company's business?

A. I can't re-call certainly whether the Major was mentioned at the first time or not, Mr. Lehmann; he was, either then or afterwards.

Q. And the Senator stated that he understood that the Rialto Company's business was properly conducted?

A. Yes sir.

Q. And was different from the Brooks Company's business.

A. Yes sir.

Q. And he asked you whether there were any complaints there?

A. Yes sir. My recollection would be that he asked that question first, about the status of the Rialto Grain and Securities Company.

Q. And you didn't know, did you?

A. I did not.

Q. And, in order to ascertain, you sent a clerk to look, and he brought, I believe, what you call a "Jacket"—have you got that (addressing one of the Counsel for the Government) I want the Washington one.

The WITNESS: Mr. Smith has that.

Q. Well, perhaps you can go on just as weel from recollection.

A. I think I can.

Q. Yes. You sent and got the jacket that has been introduced here, as being the one that is here from Washington?

A. Why, not quite that. I sent and had a memorandum 292 made from it.

Q. You didn't bring up the jacket?

A. No sir.

Q. And the clerk went out and made a memorandum, and that was to the effect that there were complaints by Bella Evans and Mrs. K. C. Hout?

A. Yes sir, of course, I am testifying now more as to what would be done than my recollection is as to exactly what I did do at this time. That is what would have been done.

Q. And you gave him that information?

A. I did.

Q. That there were complaints by these two ladies?

A. Yes sir.

Q. You didn't know what the complaints were?

A. Except as the jacket showed them, the case, and whatever——

Q. What I mean by that is: you knew nothing whatever of the substance of the comp-aints?

A. No sir, further than shown by the record.

Q. Exactly. Well, that would show simply the fact that complaint——

A. (Interrupting.) And the nature of it; that is, the brief, the charge that was made.

Q. In other words, what is on the back here (indicating jacket shown witness)?

A. That is all.

Q. "Subject: Alleged fraudulen*d* scheme. Complainant: Bella Evans, Mrs. K. C. Hout?"

A. That is it, yes sir.

Q. And that is all the information you had?

A. That is all.

Q. But there was no discusison about the subject matter of these complaints?

A. No sir.

Q. He didn't assume to know anything about that?

A. No sir.

Q. And you didn't assume to know anything about that?
293 A. I didn't.

Q. He made no representation to you with respect to the merits of these complaints?

A. He did not.

Q. And you didn't, at that time, either of you, discuss any such thing as the issuance of a fraud order?

A. No sir.

Q. And you never did discuss with him the issuance of a fraud order, did you?

A. I can't recall it.

Q. And he never requested that no order be issued, did he?

A. I think not.

Q. And you have told now the substance of what occurred at that first interview?

A. I have tried to, yes sir.

Q. Which was November twentieth—I give that date, Mr. Cochran, because I think it was fixed by letters?

A. Yes sir.

Q. And not to leave it in the air as to date?

A. Yes sir.

Q. Now, these complaints had been, prior to that time, sent out to St. Louis?

A. Yes sir.

Q. Now, when an inspector gets a complaint he usually goes right to the person against whom the complaint is made, does he not?

A. Well, I couldn't say that that is the general rule.

Q. Well, it is frequently so?

A. It is frequently so.

Q. Yes, and then, the investigation, if made at this end, would necessarily be made of the Rialto Grain and Commission Company?

A. It could have been conducted in another way. That is, they would have had to be seen at some stage, but not necessarily at the beginning of the investigation.

Q. That depends very much on the discretion of the Inspector, does it not?

294 A. Yes sir.

Q. And the matter noted there (indicating jacket) as far as that was concerned—there was that simple inquiry, and that statement that the Dennis trouble had grown out of the Brooks Company and that the Rialto Company, he understood was conducted properly?

A. Yes sir.

Q. Now, the second visit, which was on January ninth, 1902—I think that is fixed—I give you that date on the strength of telegrams that relate to Bowman and Shove?

A. Well I——

Q. (Interrupting.) I don't ask you to confirm that date at all. I merely fix it as the date of the second visit.

A. Yes sir.

Q. Now, he came there, and he simply inquired as to whether or

not Bowman and Shove were officials of the United States and were investigating the Rialto Company?

A. That is my recollection.

Q. And you informed him that they were not?

A. I did.

Q. (Continuing:) And that if any such persons as they were claiming to be inspectors, why, they were frauds?

A. Yes sir.

Q. And that was all that occurred at that time was it not?

A. Well I think so; of course, there may have been this general discussion about the Rialto Company, but I can't state certainly whether there was or was not.

Q. But there was nothing said at that time about the issuance of a fraud order?

A. I don't recall it—anything of that kind.

Q. And no discussion with respect to it?

A. I think not.

295 Q. Now, Mr. Cochran, the third visit, as I understand, was on December the fifteenth; and again I don't ask you to affirm that date?

A. Yes sir.

Q. But, I think these are fixed correctly?

A. Yes sir.

Q. And that was the time when he called with Major Dennis?

A. That was the time.

Q. He called at your office and he introduced him, and you knew at that time that there was an indictment pending against Major Dennis?

A. I did.

Q. And Mr. Burton came there and introduced his client?

A. He did, yes sir.

Q. You understood that he would Counsel for Major Dennis, is not that it?

A. No, I did not at that time, Mr. Lehmann, he had not distinctly stated so at that time.

Q. Well, he introduced him, and said he wanted you to see the manner of man he was?

A. Yes sir.

Q. And you knew that the case was pending?

A. Yes sir.

Q. And there was allusions to that, was there not?

A. To the case?

Q. Yes.

A. I think there was.

Q. So that, the case against Dennis was talked about?

A. Yes sir.

Q. Now, at that time, he said nothing whatever about the issuance of a fraud order, did he?

A. I think not.

Q. Now, the fourth visit was on January the twenty-fourth?

A. The twenty-fourth.

Q. That date you fixed yourself?
A. Yes sir.

Q. And that was entirely with respect to the books of the
296 Brooks Brokerage Company?
A. Yes sir.

Q. And, I believe you stated in your direct examination, that, at that time you had not understood, or did not understand, that they were the Brooks Company's books, but were acting with the view that they were the books of the Rialto Grain and Securities Company?

A. I supposed that they were, at that time.

Q. Now, when did you ascertain that they were in fact not the Rialto Company's books but those of the Brooks Brokerage Company?

A. It was not until the other trial of this case.

Q. So that, up until that time, you had been under the impression that when Mr. Burton called at your office on this occasion of January twenty-fourth, he was calling in behalf of the Rialto Grain and Securities Company?

A. Yes sir.

Q. Now, all his conversation at that time was with reference to the Brooks Company's books, was it not—that was his business?

A. That was his business.

Q. And whatever other conversation was had clustered around that in some way?

A. Yes sir.

Q. And grew out of the discussion of the Brooks Company's books?

A. Yes sir.

Q. He stated to you that those books—whether there was one or more—I have not yet determined—had been voluntarily given by Dennis to the authorities of the United States?

A. He said they had been voluntarily given. I don't remember that he stated by whom or not, but that statement was made.

Q. I think you will re-call, will you not, Mr. Cochran, that it had been in connection with the Dennis indictment that they had been given?

A. Oh, yes, it was.

297 Q. And having been voluntarily given, why, it meant that Dennis who was the Defendant in that case, had voluntarily given the books to the Government?

A. Yes sir.

Q. And the statements and representations he made to you at that time were that those books, having been voluntarily given by Dennis to the authorities of the United States, and having been used to the full extent for the purposes of the United States, good faith required that they should be returned to Mr. Dennis before any other use was made of them by other parties. That was the substance of it?

A. That was the substance of it.

Q. Those are the statements and representations that you referred to in your examination in chief, which you say were substantially

repeated when you and Mr Burton went to see Mr. Fristoe at the Fourth Assistant Post Master General?

A. Yes sir.

Q. You had declined to interfere, and Mr. Fristoe declined, and thereupon you all went to the Post Master General?

A. Yes sir.

Q. And the statements and representations which I have rehearsed here were in substance reape-d by Mr. Burton to the Post Master General?

A. They were repeated. I stated, you know, that I wasn't as positive about his presence there as I was about that of Mr. Burton and myself.

Q. Well we will treat that as immaterial matter?

A. Yes.

Q. That is to say, you neither include or exclude him in the matter as I understand?

A. Yes sir.

Q. He may have been there and he may have not?

A. My impression was that he was there.

298 Q. Yes; well that is why I included it?

A. Yes sir.

Q. But, feeling that that is immaterial now; these statements and representations were substantially repeated if not by him, then, either by you or Mr. Burton, to the Post Master General?

A. Yes sir.

Q. And the Post Master General directed a telegram of inquiry, which you have referred to, to be sent?

A. Yes sir.

Q. In that interview, from its beginning in your office, its continuation in the office of Mr. Bristoe, and its ending in the office of the Post Master General, there was nothing whatever said about a fraud order, was there?

A. No sir.

Q. Now then, the fifth visit, being the last one which he ever made to you until after the indictment was returned, was also with respect to the books of the Brooks Brokerage Company?

A. Yes sir.

Q. And it was because the books had not yet been turned back and he was making a complaint of that?

A. Yes sir.

Q. That the books belonged to Mr. Dennis, and good faith required that they should be returned to him if the Government was through with them?

A. Yes sir.

Q. And he insited that the Government was necessarily through with them because the case against Dennis had come to an end?

A. Yes, and the statement was also made that the United States Attorney said that he had not use for them.

Q. Yes.

A. Yes sir.

Q. Now, all that there was now, in that interview, from beginning to end, there was no talk about the issuance of any fraud order?

A. No sir.

299 Q. But you were formerly of the opinion that all that—those two efforts there to get the books, had relation to the business of the Rialto Grain and Securities Company?

A. Yes sir.

Q. And therefore, you testified on the former trial, that he said he wanted to appear in other matters as he had in the Rialto Company matter; but you are now advised that that was a matter with Mr. Dennis in reference to the Brooks Company's books, are you not?

A. I am afraid not, Mr. Lehmann.

Q. The two last visits?

A. That was not my understanding exactly.

Q. Well how about—you understood at that time that the books were the Rialto Company's books?

A. Yes sir.

Q. And you are now advised otherwise?

A. Yes, but the discussion was a discussion relating to the Rialto Company.

Q. On the fourth visit?

A. Yes sir.

Q. I understood you to say that the only thing talked about was the books?

A. I know, but the Rialto Company was what was in my mind at that time.

Q. What was in your mind?

A. Yes sir.

Q. Yes. But now you understand that that is an incorrect impression?

A. Well, that is possibly a matter of opinion. I don't know whether it is or not.

Q. Now, and on the subject of business of the fifth interview, that was about the Brooks Brokerage Company's books again?

A. Yes sir.

Q. Now, Mr. Cochran, the only time that you ever gave Mr. Burton any information with respect to any complaints against the Rialto Grain and Securities Company was the one time on

300 November the twentieth when you told him there were complaints of Bella Evans and Mrs. Hout, which had been sent out?

A. I think so; of course, I told him about the Inspectors that he inquired about, whether they were investigating that cause or not?

Q. Yes, but I mean about any claim?

A. Yes sir.

Q. I call your attention, that you may refresh your recollection from it, if it be necessary, to the copy of the jacket retained at Washington; which has the endorsement on the back "complainant: Bella Evans and Mrs. K. C. Hout" and then it has a large number of other endorsements in pencil?

A. Yes sir.
Q. Under the head of "Correspondence?"
A. Yes sir.
Q. The beginning—please give me the first date, will you?
A. Complaint of F. R. Fravel, Washington, D. C.——
Q. (Interrupting.) You needn't run through them, but there are a large number?
A. Yes sir.
Q. On that (indicating jacket)?
A. Yes sir.
Q. And five or six before March the twenty-sixth?
A. Yes sir.
Q. That is just a rough guess?
A. Yes sir.
Q. Well, more than that possibly—not many more because some take two or three lines?
A. Yes sir.
Q. You never informed him as to any of those additional complaints?
A. No sir.
Q. And he never again made an inquiry from you as to whether complaints had been lodged in the Department against the Rialto Company?
A. I think not.
Q. Now, he repeatedly said to you, did he not, that he
301 didn't wish to antagonize the Department in any way?
A. He did.
Q. And that he would withdraw from any matter that involved any antagonism of the Department, did he not?
A. Well, he may not have put it in just that way, but that he would submit to the action of the Department. That is: he wouldn't contend for his view of the case even if he was satisfied the Department was wrong.
Q. Even if he was satisfied the Department was wrong?
A. Yes sir.
Q. Now, was not Col. Smith present at the interview you had—when was it—in March?
A. You mean the last one?
Q. The last one?
A. Yes sir.
Q. He was present throughout that interview?
A. When Mr. Vickery and I went there?
Q. Yes.
A. Yes, he was present all the time.
Q. All the time, throughout that interview?
A. Yes sir.
Q. The case referred to, inaugurated by the Hout and Evans complaint had not been returned to Washington from here had it?
A. No sir.
Q. Do you know whether there was any correspondence whatever with respect to it during that time?

A. I don't know.

Q. Would there naturally be any except to send out any additional letters that came in, with the printed form?

A. Well, it would depend altogether on the case whether there would be or not.

Q. Now, up to April first did you have—April first, 1903—

A. (Interrupting.) Yes sir.

Q. (Continuing:) Did you have any personal knowledge
302 of that case whatever?

A. Well, yes, I had some knowledge of it when my attention was directed to it by the first visit of the Senator.

Q. Well that there was such a case pending?

A. Yes sir.

Q. What I have reference to is as to the merits of it; whether the complaints were well founded or illy?

A. I had not given it any particular attention.

Q. I presume there are so many of these things you don't attempt to do that?

A. I couldn't.

Q. So that, never during this entire period did you have any information as to the justness of the complaints which were docketed there?

The COURT: You needn't answer that.

To which ruling of the Court Defendant, by Counsel then and there duly *accepted*.

Q. Did the Senator, during that period, say, at any time, that those complaints were not weel founded; or did he at any time assume to know anything about these complaints themselves?

A. I can't recall any further conversation than the general statement that the Company was all right.

Q. That he understood it was?

A. Yes sir.

The COURT: I would be glad if you would be definite. Did he say it was all right, or that he understood it was all right?

A. He said it was all right. I perhaps made a mistake.

Q. Well, he didn't pretend to have organized the Company?

A. Oh, no, no sir.

303 Q. Nor to be conducting it?

A. No sir.

Q. And when you gave him the information about that, did he make and -quest with respect to those cases, for any action of any kind by you?

A. I don't recall any.

Q. He didn't request any information or any action either?

A. No sir.

Q. And never did?

A. In reference to those cases.

Q. That is what I mean, in reference to the Evans and Hout cases?

A. No sir.

Q. Now, you re-call the former trial, were you not asked "Q. At any of these interviews between Senator Burton and yourself prior to the indictment did he indicate to you that he would not undertake to appear in the Department against the United States" and you answered "He did" that is correct, is it not, Mr. Cochran?

A. Yes, sir, I believe so.

Q. You say you think so—I didn't quite get your answer.

A. I said I thought so.

Q. Then you were asked, "Q. Are you able to re-call on which occasion that occurred" and you answered "Why, I cannot with any certainty. The Senator told me that several times" that is correct?

A. I believe that is right.

Q. "Q. Disclaimed whenever the occasion arose, didn't he, any purpose or intention to appear there against the United States?" A. "I think he did, yes sir" that is correct?

A. Yes sir, that is correct.

Q. "Q. Do you re-call his having indicated that so far from desiring to appear as against the United States, if an occasion arose when summary action was necessary that he did not even ask to be notified with reference to it?" ? and you answered "No sir, I
304 cannot re-call that. He did say however that he would not antagonize the Department, no matter whether he thought they were right or wrong or not, that even if he thought the position taken by the Department were wrong, even then he would not oppose them."

COUNSEL FOR THE GOVERNMENT. I submit that has all been gone over. The witness testified precisely that on this occasion.

Q. And you testified then also that you were not able to re-call any occasion upon which the Senator made any representation to you, or had any conversation with you, in reference to the issuance of a fraud order. And you answered "No sir."

A. Yes sir, I made the same answer this time:

Redirect examination.

Mr. DYER:

Q. In your capacity as Chief Post Office Inspector, did you have any right to issue fraud orders?

A. No sir.

Q. Upon whom in the Department is that duty imposed?

A. The Post Master General.

Q. Upon whom should inquiry first, if any one, be directed, in reference to that matter, as to whether a fraud order should be made?

A. In the Department itself?

Q. Yes.

A. The Department proper?

Q. Yes.

A. The Assistant Attorney General.

Q. Who was the Assistant Attorney General between the dates

that I first mentioned, to-wit: the twentieth day of November to the first day of April 1902, and 1903?

A. James N. Tyner.

Q. He is now dead?

305 A. He is dead.

Q. Any request that might be made to withhold a fraud order would not be made ordinarily to you?

A. No sir.

Q. That you had no control of?

A. No sir.

Q. Your duty, and the duty of those under you, was to make the investigation and report the facts to the Assistant Attorney General, is that tru-?

A. Yes sir that is right.

Q. If a fraud order was i--ed at all, it was first investigated by the Assistant Attorney General, and afterwards submitted to the Post Master General for his action upon such evidence as was laid before the Assistant Attorney General, is that true?

A. Th*ta* is right.

Q. Mr. Payne, the Post Master General between those dates, is also dead, is he not?

A. Yes sir, he is dead.

Q. Now, if any hearing upon any complaint of this kind was had, and a request being made for a hearing, or to be present at a hearing, to whom of the Post Office Department would that request go?

A. It should go to the Assistant Attorney General.

Q. The request would not come to you?

A. No sir.

Recross examination:

Mr. LEHMANN:

Q. When did Mr. Tyner die, Mr. Cochran?

A. Why, he died some time more than a year ago I think.

Q. And Mr. Payne?

A. Mr. Payne died—well Mr. Tyner must have died less than a year ago.

Q. I think so.

A. Mr. Payne died about the first of October 1904.

Q. Yes, about the first of October 1904?

A. About.

306 Q. And Mr. Tyner at what time?

A. Well, since then, according to my recollection. I can't undertake to fix the date.

Q. Tyner died since Payne?

A. That would be my impression.

Q. Well, and that was after the first trial of this cause?

A. Yes sir.

COUNSEL FOR THE GOVERNMENT: I have no put this in as consecutively as I should. I introduced three of these checks, and I

have the fourth that has not been read in evidence. I offer it in this connection now.

COUNSEL FOR THE DEFENDANT: That is objected to. But not on the ground that it is not shown to be authentic.

The COURT: It may go in.

To which ruling of the Court Defendant, by Counsel, then and there duly excepted.

COUNSEL FOR THE GOVERNMENT: The check is in words as figures as follows to wit:

$500.00 WASHINGTON, D. C., *Dec. 15th*, 1902.

On Demand Pay to the Order of J. R. Burton Five Hundred Dollars.

E. T. Dec. 17, 1902.

Value received and charge the same to account of
THE RIALTO GRAIN & SECURITIES CO.
By HUGH C. DENNIS, *President.*

To the Commonwealth Trust Co.
St. Louis, Mo.

(Endorsed on the back) J. R. Burton, Pay Commercial Nat'l. Bank, Chicago, or order. The Riggs National Bank of Washington, D. C., Arthur T. Brice, Cashier. Pay Mercantile Trust Co., St. Louis, Mo., or order. Commercial National Bank of Chicago,
307 Jos. T. Talbert, Cashier. Pay the Nat'l. Bank of Commerce, in St. Louis, or order, Dec. 20, 1902. Mercantile Trust Company, Geo. W. Wilson, Treasr. St. Louis Clearing House. 26. The National Bank of Commerce in St. Louis, Dec. 22nd, 1902.

W. J. VICKERY, being duly sworn, testifies as follows on the part of the United States:

Direct examination.

Mr. DYER:

Q. What is your full name?
A. W. J. Vickery.
Q. What official position do you hold in the Government?
A. I am now Chief Post Office Inspector.
Q. And your Head quarters?
A. Washington.
Q. In the Post Office Building?
A. Yes sir.
Q. Did you succeed Mr. Cochran the last witness on the stand?
A. Yes sir.
Q. When did you enter that office?
A. On the first day of July, 1904.
Q. Prior to that time what was your employment?
A. For six years before that was Inspector in Charge in Cincinnati, and before that, from 1889, Post Office Inspector in the Field.
Q. Do you know the Defendant, Burton?

A. I was introduced to him at one time, met him once only.

Q. When was that?

308 A. I think the twenty-third day of January of 1904, the date on which the indictment of the Senator was made public.

Q. Where did you meet him?

A. At his room, his office, in the Maltby Building at Washington.

Q. In company with whom?

A. With Mr. Cochran.

Q. State what took place at that meeting?

A. Senator Burton told Mr. Cochran that he had sent for him to have a talk with him; that he wanted to know for what he had been indicted at St. Louis. Mr. Cochran told him that it would be hardly proper for him to state, as he had been a witness before the Grand Jury and was under oath not to divulge, and that, if there was a trial to follow, he would be a witness again. He said that if there was anything material that the United States Attorney probably would give him what was proper for him to have; that the testimony had been taken before the Grand Jury. The Senator then said that he wished to state his own recollection of matters. There was some discussion I think as to the section that had been violated; as to the number, 1781 or 2. He said that his memory was generally very good, but he said that he had seen Mr. Cochran and always had said that he wouldn't antagonize the Post Office Department. As I recollect it Mr. Cochran, in explaining the offense, said that it was for practicing before the Department; that that statute was too long to attempt to quote it. That the Senator then told him that he had appeared before the Department only as Attorney for the Rialto Grain and Securities Company, and that he had been employed by them on the occasion of one of his trips either to or from

309 Washington; that he had received a good fee; that he was no cheap lawyer. He mentioned the fact, as I recollect it, of his having been indebted, and needed money, and also mentioned—in the way of going over his recollection of the events that had occurred—that he had said to Mr. Cochran before, and repeated it, that the practice was profitable; that he had been—possibly—I think the pension office was mentioned—that he had consulted some Senator as to whether it was proper for him to practice in that way; that he had no intention of violating the law, and that his clients he would always try to put up in line with the Department; he wouldn't antagonize the Department but would seek rather to have them do what the Department wanted.

Q. What else took place if anything, at that particular time?

A. That was the substance of the interview. There was quite a long—somewhat extended conversation—in which, of course, I had no part, being a stranger to Mr. Burton, the senator, to Mr. Cochran, reviewed his connection with the cases in that way.

Q. What, if anything, was said, at that time about the amount that he had received from the Rialto Grain and Securities Company for his services as Attorney before the Post Office Department?

A. I don't recollect any specific amount, except that he had gotten a good fee; that he was not a cheap Attorney.

Q. After the statute was called to his attention, and the section of the statute under which the indictment was probably found was there any change in what was said, or state what was said with
310 reference to that after he saw the statute or knew what it was?

A. Well the only noteworthy thing was that the mention of his having appeared as Attorney was dropped from that time on; there was no further statement that he was before the Department as Attorney, after Mr. Cochran had mentioned the terms of the statute.

Q. After that was stated to him—appearing the—appearing before the Department as Attorney was stated before his attention was called to the statute?

A. Before it had been gone into fully, yes sir.

Cross-examination.

Mr. LEHMANN:

Q. Now, didn't he say at that time that he had been employed in this case as Attorney; that he had met them at St. Louis on his way either to or from a session of Congress; that he had received a fee from them, a good fee—that he was not a cheap Attorney and would not accept service unless they could pay; that it was intended or expected that he might be here at some trial, but afterwards that had been abandoned, they having determined it was not necessary, and he did not come?

A. Yes sir, he said that.

Q. So that the fee that he referred to was in the case that was expected to be tried here?

A. No, the fee wasn't referred to in that case. The fee was for his appearance, as he related to Mr. Cochran, his appearance before the Department as Attorney, because he quoted that he mentioned to Mr. Cochran on his visit with Mr. Cochran that he wouldn't
311 antagonize the Department. He mentioned that particularly as something incidental—it was his intention he should appear here in the case, but that was abandoned afterwards.

Q. On the former trial of this case, after having stated your name and residence, and official acquaintance with Senator Burton, you were asked how you were introduced to him, and you said "At Washington at the Maltby Building, in his office" that is correct?

A. Yes sir.

Q. Then this question was put to you "By whom were you introduced to him" and you answered "By Mr. Cochran" that is correct?

A. Yes sir.

Q. I am putting this to you as being your former testimony.

A. Yes sir.

Q. Then the question was put to you "Will you state your recollection of what occurred at that interview at the Maltby Building between Senator Burton and Mr. Cochran, and yourself" and was not your answer this "At Mr. Cochran's request I went with him in the afternoon, I think, of January the twenty-third, perhaps about five o'clock to the Maltby Building and Senator Burton and Col. Smith his Secretary, were in the office at the time. Senator Burton told Mr.

Cochran that he was anxious to know why or for what he had been indicted; the indictment had been published that day, I believe. Mr. Cochran said it would be improper for him to state, in as much as he had been a witness before the Grand Jury and would, if a trial followed, be a witness again. The section of the statutes was inquired about, and as I re-call it, there was an uncertainty as to
312 whether it was 1782 or the one preceeding or the one following. No copy of the statutes was there and a memorandum was made of the number. Mr. Cochran said that the statute was a comprehensive one and he would not undertake to quote it, but, in effect it prohibited a Senator or Member of Congress from appearing before the Department; that he could not say anything as to what the charges were I think he also mentioned that the United States Attorney at St. Louis had his testimony and could make known what ever he thought proper of that. Then Mr. Burton said he desired to repeat before Mr. Cochran his recollection of what had occurred. He said that he had appeared for this securities Company as the Attorney; that he had always sought not to antagonize or bias the Department, that he desired, rather, that his client should come into harmony with the rules of the Department. He said he had visited other Departments, and I think the Pension Department was mentioned; that he would not do it if he thought it improper. He mentioned consulting some one as to the propriety of this, and that he certainly would not do it if he thought it was anything wrong. He said he had been employed in this case as Attorney; that he had met them at St. Louis on his way there to or from a Session of Congress; that he had received a fee from them, a good fee, that he was not a cheap Attorney and would not accept service unless they could pay; that it was intended or expected that he might be here at some trial, but afterwards that had been abandoned, they having determined it was not necessary, and he did not come. He again repeated that idea that he did not seek to antagonize the Department in his appearing before it, and that he would not undertake anything that he
313 supposed was prohibited by the law" that was your answer to the question?

A. Yes sir.

Q. Then you were asked "You say that in that interview he mentioned the Securities Company; was the Rialto Grain and Securities Company mentioned" and you answered "The word Rialto was used. Of course, I was not familiar with the Company before that time, but that name was mentioned, the Rialto Grain and Securities Company" that was your answer?

A. Yes sir.

Q. And again "What further was said, if anything, in reference to his being the Attorney for the Company at Washington?" and you answered "I think the words used by Mr. Cochran as to practicing before the Department, I recollect the Senator said at the close, or near the close of the interview, that he had not bee- practicing before the Department. At the start he made the distinction that he appeared only as Attorney for the Company, and was not seeking—he didn't say that in words—at any rate the distinction was made

between seeking anything wrong for the Company or biasing or antagonizing the Department in any way" that is your answer?

A. Yes sir.

Q. And this question "Was that about all that took place?" and the answer "Practically all. There was some general conversation there, and I think perhaps an agreement on Mr. Cochran's part that Senator Burton had several times mentioned the fact that he did not want to antagonize the Department" and that was the whole of your testimony at that time, as I have read it?

314 A. Yes sir.

Q. As far as your recollection goes?

A. Yes sir.

PAUL B. KAISER, being duly sworn, testifies as follows on the part of the Government:

Direct examination.

General ROBB:

Q. Will you state your name and residence?

A. Paul B. Kaiser, Washington, D. C.

Q. What position do you occupy, if any, in the Government Service at Washington at this time?

A. I am Assistant Attorney for the Post Office Department.

Q. A member of the bar, Supreme Court District of Columbia?

A. I am.

Q. What position if any, did you occupy in the Post Office Department from November 1902 up to and including March the twenty-sixth 1903?

A. I was a clerk in the office of the Assistant Attorney General, Post Office Department.

Q. Whether or not, during that period, the Defendant, Senator Burton, to your knowledge, appeared or came into the office of the Assistant Attorney General, if he did?

A. He did, yes sir.

Q. Who was the Assistant Attorney General for the Department during that period?

A. Mr. James N. Tyner.

Q. When, if you are able to state, did the Defendant appear at the office of the Assistant Attorney General?

A. He appeared the day that Congress convened, 1902.

315 Q. And are you able to state what day that was?

A. That was December one.

Q. And what day of the week?

A. Monday.

Q. December first, Monday December first 1902?

A. Yes sir.

Q. At what time of the day did he appear?

A. It was five to ten minutes before nine o'clock in the morning.

Q. And whom did he see?

A. He saw me when he first entered the office.

Q. Did you have any conversation with him?
A. I did, yes sir.
Q. What was it?
A. He asked for the head of the office. I told him that the gentleman had not yet come down to the office—it was before nine o'clock—that—he then pointed to a desk in the office and asked me whether the gentleman who occupied that desk had come down. I told him that the gentleman had come down to the office. He then asked me where that gentleman was. I told him that the gentleman had stepped to the room across the corridor on the other side of the building. He asked me to go and tell that gentleman to return to the office immediately, that he wanted to see him. He said "Do you know who I am" I said "No sir"——

COUNSEL FOR DEFENDANT: This does not refer to the Assistant Attorney General, and is no foundation, as I understand it.

Q. You were then a clerk in his office?

COUNSEL FOR DEFENDANT: What I mean: the indictment charges in one of the counts, I believe, Post Master General, Chief Post
316 Office Inspector, and Assistant Attorney General for the Post Office Department. He first said he inquired for the head of the office; that would be the Assistant Attorney General, now I understand the inquiry is directed to some other and entirely different person.

The COURT: Somebody in that office?

COUNSEL FOR DEFENDANT: Somebody in that office

The COURT: Well I will admit it. I don't know what it will lead up to.

To which ruling of the Court Defendant, by counsel, then and there duly *accepted*.

Q. Was there any one else in that office at that time but you?
A. No sir, I was alone.
Q. Well, you may proceed now with the conversation.
A. After telling me to go and tell the gentleman that he wanted to see him immediately he said "Do you know who I am" I replied that I did not. He said "I am Senator Burton, United States Senator from Kansas. You go tell the gentleman that I want to see him right away" He also added that he had to see him right away as Congress convened at twelve o'clock and he had to go to the Capitol.
Q. Who occupied the desk at which the Senator pointed?
A. A. Mr. Hubner.
Q. And what was Mr. Hubner's position in the Department?
A. Mr. Hubner was clerk in the office of the Assistant Attorney General.
Q. And did you go and get Mr. Hubner?
A. I rather hesitated because of the imperative——
317 Q. (Interrupting.) Well never mind that.
A. I hesitated, and the gentleman repeated his direction that I get the gentleman, and upon the repetition of his request or direction, I stepped to the door of the office, to the door. I stepped to the door then and Mr. Hubner was coming down the corridor, and I

old the gentleman that Hubner was approaching and would be there n a minute.

Q. And did Mr. Hubner appear?

A. He did, yes sir.

Q. And whether you left Mr. Hubner—the Defendant, Senator Burton—with Mr. Hubner?

A. I did, yes sir.

Q. And you know nothing further than that period, nothing that followed, of your own personal knowledge?

A. I do not.

Cross-examination waived.

FRANCIS C. HUBNER, being duly sworn, testifies as follows on the part of the Government:

Direct examination.

General ROBB:

Q. State your name, residence and occupation?

A. Francis C. Hubner, Woodside, Maryland—Woodside is a suburb of Washington, D. C.

Q. What position do you occupy, if any, in the Post Office Department at Washington?

A. Clerk in the office of the Assistant Attorney General for the Post Office Department.

Q. What position did you occupy, if any, during the period from November 1902 to March twenty-sixth 1903?

318 A. I occupied the same position that I do now.

Q. You are a member of the bar of the District of Columbia, The Supreme Court of the District of Columbia?

A. Yes sir.

Q. You are technically designated as "Clerk," your duties are really those of a law clerk?

A. Yes sir, they have been in that office.

Q. Did you see, at the office of the Assistant Attorney General for the Post Office Department during the period that I have covered, the Defendant, Senator Burton?

A. I did; I saw him there.

COUNSEL FOR DEFENDANT: I submit that is all immaterial.

The COURT: I will have to over rule your objection now; I don't know what it will lead up to.

To which ruling of the Court Defendant, by Counsel then and there duly *accepted*.

The WITNESS: I didn't quite finish my answer.

The COURT: Finish your answer always.

Q. Speak a little louder.

A. I saw him there the early part of December or the latter part of November 1902.

Q. At what time of the day, if you are able to state?

A. Well, to the best of my recollection, it was in the morning.

Q. And for whom, if any one, did Senator Burton inquire?

A. Well to the best of my recollection, when I came into the room I said "Do you want to see General Tyner?" and he answered "Yes"

319 Q. And was General Tyner there at that time?

A. No sir, he was not.

Q. Did he come——

A. (Interrupting.) He came later in the day.

Q. And whether or not Senator Burton waited to see General Tyner?

A. The Senator did wait to see him.

Q. How long did he wait?

A. Well, possibly half an hour.

Q. And did he see General Tyner?

A. Yes sir.

Q. And how long was he with him?

A. Well, I should estimate it at about half an hour, or it might be a little less or possibly more.

Q. Did you know the business that he was there to see General Tyner about?

A. I did not.

COUNSEL FOR DEFENDANT: Now I move to strike out that testimony, as ne-ther competent, relevant, nor material.

THE COURT: Have you any cross-examination?

COUNSEL FOR DEFENDANT: No sir.

COUNSEL FOR THE GOVERNMENT: We will connect the matter up later.

THE COURT: The motion to strike out will be over ruled for the present. It is stated by Counsel that they will connect this matter up. They are not required to make the connection immediately.

320 RICHARD H. LINDSAY, being duly sworn, testifies as follows on the part of the government:

Direct examination

Mr. DYER.

Q. Mr. Lindsay, you may state your residence, if you please?

A. I live in Washington, D. C.

Q. What is your business.

A. I am a newspaper correspondent there, representing the "Kansas City Star" and "The Kansas City Times."

Q. How long have you been in Washington representing those two papers?

A. I don't know; about four years I think.

Q. Do you know the Defendant, Joseph Ralph Burton?

A. I do.

Q. How long have you known him?

A. Oh, I have known him a good many years, I don't remember just how long; probably eight or ten years or more.

Q. Did you see the Defendant at Washington on the twenty-third of January, 1903?

A. I couldn't re-call, Colonel, whether I saw him on that day or not.

COUNSEL FOR DEFENDANT: In order to avoid any confusion in the record, the impression that I got from Mr. Vickery; I think Mr. Cochran mis-stated the date of that interview, and I don't think we ought to have any confusion in the record.

The COURT: If you don't know just what the date was you may state so.

Mr. COCHRAN (sitting in Court Room): The twenty-third
321 day of January.

COUNSEL FOR DEFENDANT: I think, Mr. Cochran, you said March.

Mr. COCHRAN: I think I did.

COUNSEL FOR DEFENDANT: Of course, you don't mean that date.

Mr. COCHRAN: I didn't, I meant February.

The COURT: Well, let it be so stated.

Q. Well, did you have any conversation with him at Washington newspaper report or otherwise, of the indictment pending here against him?

A. Yes sir.

Q. Did you at that time reduce to writing what was said, substantially what was said between you?

A. I had an interview with Senator Burton over the telephone the day he was indicted here in St. Louis, and I reduced that to writing, yes sir, and telegraphed it.

Q. And was that interview that you had with him communicated by you to the Kansas City papers?

A. Yes sir.

Q. Now, with a view of refreshing your memory, you may look at this (handing witness newspaper clipping) and state whether that was the interview that you gave to the paper at that time, and whether that was the interview substantially, that you had with the Defendant on that day?

COUNSEL FOR DEFENDANT: I understand he had this conversation over the telephone, and he should state from recollection, not from the article sent to the paper. The article is manifestly a good deal more than an interview if the Court will look at it.

322 A. Yes, I sent this article.

Q. What I want to do is only to refresh your memory with a view to shortening this inquiry. Can you tell from recollection what the conversation was between you and the Defendant over the telephone that day?

A. I can give part of it. I couldn't give it in detail. I think I could give the substance of what the Senator said.

Q. You have looked at this paper?

A. Yes sir.

(Counsel for the Government hands paper in question to the Court)

Q. Was that taken from a written matter made at the time of your interview?

A. Yes, the interview, part of it was. This statement (indicating clipping) or rather the substance of it, I thought I gave the Senator in quotation marks there. I am not quite sure that is exactly what he said, it was the purport of what he said.

Q. Well, it was the substance of what he said?

A. Yes sir, I reduced it to writing and I telegraphed it to the papers.

Q. You reduced it to writing at the time and telegraphed the papers what was said?

A. Yes sir, immediately.

Q. And this is what you reduced to writing, a copy of what you reduced to writing and sent (indicating clipping)?

A. Part of it is. That in quotation marks is.

Q. That in quotation marks is?

A. Yes sir.

Q. State, if you can, then, what was said by you to Burton, and Burton to you?

A. I called up Senator Burton over the phone, asked for the
323 Maltby Building, and when I was connected with them, I asked for his number, and Col. Smith, I think, answered the phone—his secretary—and I asked to speak to Senator Burton, and he came to the phone, and I told him that I had received a dispatch from St. Louis saying that he had been indicted there, and asked him what it was all about, and he said that he had received a dispatch himself from St. Louis and that he didn't know exactly what he was indicted about. I told him I understood it was for appearing before the Post Office Department, or something of that sort, but in the conversation he said that he had—that he had made it clear to Mr. Cochran, the Chief Post Office Inspector, that he had come before the Department as a Lawyer, and that he was—went on to say he was going to St. Louis as soon as he could and confront the charges, and that he had simply gone before the Department as a Lawyer, and he said something about representing Mr. Dennis, as Attorney for Mr. Dennis, who, he said, was an old friend of his.

Q. Well what, if anything, did he say with reference to having been employed?

A. He said he had been employed as Attorney in that case, and that he had assured Mr. Cochran at the Post Office Department when he appeared there that he came as a practicing Attorney, and then I think I told him, as I understood it, that that was what he was indicted for; that was covered in the indictment, and that was my understanding of the case there in Washington, that he had been indicted for appearing before the Post Office Department as a practicing Lawyer, and I called his attention to the section of that statute which forbade that.

324 Q. Was there anything in that conversation said about fraud order cases that you now re-call?

A. I can't say that I re-call that.
Q. Then, what time in the day was this telephonic conversation?
A. I should say it was about half past two?
Q. In the afternoon?
A. Yes sir.
Q. Then, after you had had this talk over the telephone with him, did you see him or talk with him later with reference to the matter?
A. Yes, I talked with him several times about it. I don't remember just when.
Q. Well you had no further conversation with him that day?
A. Not that I re-call.

Cross examination.

Mr. LEHMANN:

Q. Mr. Lindsay, you were a witness before on the strength of this matter?
A. Yes sir.
Q. And in that examination you told about your connection with the "Kansas City Star" and the "Kansas City Times," and about calling up Senator Burton by telephone and telling him that you had received a dispatch about the indictment, and he said "Yes" he had received a dispatch "And that began our conversation about that" then you were asked "I will get you to state whether or not at that time you took dictation from Senator Burton in reference to the matter" and you answered "Yes sir," and then the question "I will show you this paper (handing witness a newspaper clipping), dated Washington, January twenty-third, 1903, and ask you to look at it" then there is an objection made, and then Col. Dyer continues "I show you this clipping from the "Kansas City Star;" I gave
325 you the wrong one at first" then the Counsel for the Defendant said "See if he can get along without it" then Col. Dyer asks "Can you give to the Jury the conversation you had with Senator Burton at the time for that paper" and didn't you answer "I think I could give the tenor of it, I do not know that I could repeat his exact language. The Senator said over the phone that he had received a dispatch from St. Louis saying that he had been indicted there and he said he didn't know exactly what it was all about; that he was not guilty of any wrong doing; that he was going to St. Louis as soon as he could and insist upon a trial, and he said it was in reference to the Rialto Grain and Securities Company. I believe, and that the only connection he had with it was through Major Dennis, who was an old friend of his, who had been indicted, and he was Major Dennis' Attorney; that he had gone to the Department to see Mr. Cochran, I believe he said with Major Dennis, on an occasion, and he had told Mr. Cochran he had come there to see what charges there were against his client, and he had insisted to Mr. Cochran that he came as an Attorney and not as a Senator, in regard to the matter" did you so answer?
A. Why, yes, as I recollect it. It was much fresher in my memory when I gave that testimony than it is now.

Q. And so it was fresher in your mind at that time?
A. Yes sir.
Q. Then you were asked "What did you say to him then when he said he went there as Attorney for the Company?" and your answer is "I told him as I understood the indictment in St. Louis, it was on the ground that he had appeared before the Department as
326 an Attorney, and he said he had assured Mr. Cochran that he did not want to interfere with the Government's affairs in any way, manner, shape or form—something to that effect" did you so answer?
A. Yes sir, I answered that.
Q. Then you were asked "What else did he say in reference to being Attorney for the Rialto Grain and Securities Company, if anything, and what he was to do as such Attorney" and your answer "I don't think he said anything in my conversation with him. That he was employed to defend Major Dennis, who was an old friend of his as he put it" that is correct, is it?
A. I think that is correct.
Q. Then the question "That that was the scope of his employment to defend Major Dennis" and the answer "Yes sir." Is that your answer?
A. I don't re-call that now, but it is so, as I remembered it then. I can't remember the details of the conversation it was so long ago.
Q. "And did he say to you in that conversation that Major Dennis had been indicted in St. Louis, and he was employed to defend him in that indictment." Answer "Yes sir" "Is that substantially what occurred there Mr. Lindsay, between him and you" and the answer "Yes sir, I think it is." You recollect that as substantially a correct report of your interview with Senator Burton?
A. It is unquestionably correct if it is reported there.
Q. You recollect that?
A. Yes sir. As I say, the matters that I would testify to then would be much fresher in my memory at that time. I would rather go upon that testimony than upon any I could give now in
327 any way—that testimony is correct.
Q. I have read it just as it is here (indicating Transcript of Record).
A. Yes sir.
Q. Your recollection was fresher at that time?
A. Yes sir.

J. H. AUBERE, being duly sworn, testifies as follows on the part of the Government:

Direct examination.

Mr. DYER:

Q. State your name in full?
A. Jewell H. Aubere.
Q. And your residence?
A. Washington now.

Q. What is your position, Mr. Aubere?
A. Newspaper correspondent.
Q. Of what paper?
A. "St. Louis Globe Democrat."
Q. And located at Washington?
A. Yes sir.
Q. How long have you been such correspondent at Washington for "Globe Democrat"?
A. Well, I have been in charge of their Washington Bureau for five years, but I have not remained there continuously.
Q. Do you know the Defendant Burton?
A. Yes sir.
Q. How long have you known him?
A. Oh, five or six years or so before I went there.
Q. On the twenty-third of January last—I mean the twenty-third of January, 1904, did you see Senator Burton that day in Washington?
A. If that was the day on which he was indicted in St. Louis, I saw him, the day he was indicted in St. Louis.
328 Q. Well, I show you a paper from which you may be able to refresh your memory as to the date that you did see him. Will you look at this (handing witness paper)?
A. Yes sir, this bears the date of January twenty-third.
Q. What time in the day of the twenty-third of January did you see him?
A. Well, as soon as I heard that he had been indicted, in the afternoon about half past two or three o'clock, and he was—
Q. (Interrupting.) Where did you see him?
A. In his office in the—well it is called the Senate Annex, and the Maltby Building both. It is in the Capitol grounds immediately adjoining, or near to the United States Capitol.
Q. What conversation, if any, had you with him with reference to the indictment at that time?
A. I had a very lengthy conversation. I couldn't begin to recall all the conversation I had with him; I suppose I was in his office an hour maybe or nearly so.
Q. Did you, at that time, write down what was said?
A. Part of it—
Q. (Interrupting.) Did you afterwards—
A. (Continuing:) I took notes on part of what he said.
Q. What, if anything, was said by him on that evening to you, about him having acted as Attorney for the Rialto Grain and Securities Company before the Post Office Department?
A. Well, I don't re-call exactly. This interview will show (indicating paper) the copy will show exactly.
Q. Well, is that paper that I show you here a correct statement, approximately, of what was said at that first interview (handing witness typewritten statement)?
329 A. Well, the paper and the one that accompanys it is exactly what was said.
Q. Now, state when that accompanied it, how, if any, changes

were made, and when were they made, and by whom were they made in that paper?

A. Well, can I explain what this other paper is?

Q. Yes.

The COURT: You may.

A. Well this paper that is attached to it is a copy of my dispatch that is the portion of the dispatch that I sent that evening. I saw him in the afternoon. I took notes after we talked in a general way—I, of course, was interested in all he said—I said "Let us have an understanding of what I may say that you wish to have published" I would suggest—I took some papers and he dictated to me, I asked him questions which I would write down, and he would reply to me, and this copy here is a typewritten transcript of the notes I made at that time; that is a portion of my message; that is not all of it, but a portion of the dispatch from the dictated statement.

Q. Does that paper you have got there contain the statements that were made to you by him?

A. Yes sir.

Q. Was there any change made in that typewritten statement that was so dictated by him to you, in the afternoon of that day, before the paper dispatch was sent away?

A. Well, not in the afternoon; there was a change made in it in the evening, after nine o'clock in the evening, in my office.

Q. Well, who directed the change?

A. Well these changes—the Senator dictated the changes as he did the original statement.

Q. Was it at your office there in Washington, do you mean,
330 those changes were made?

A. Yes sir.

Q. And did you write down what he told you to write?

A. Word for word.

Q. Word for word, and those papers contain—does that paper contain the original statement that was made to you and dictated to you by the Defendant, and does it contain the changes that were made at his dictation later in the day?

A. If I follow you—is this what you mean (indicating typewritten statement). This is the original statement that he dictated, and on this statement I made the changes he suggested in the evening. Therefore the statement represents the statement he made in the afternoon, and the stuff I have written in there represents the changes made in the evening.

The COURT: Do you mean that what is in typewriting represents the interview as you reduced it to writing?

A. In the afternoon.

The COURT: And then, what is added in pencil indicates the changes that were made at the Defendant's suggestion later on?

A. Yes, that is, except somebody—these under lines must have been put on here in the District Attorney's Office; this underlining of certain parts—it could be subsequent—

The COURT: The under scores?

A. Yes sir, that is not mine. It is not typewritten here the changes he dictated in the evening.

Q. What is this (indicating)?

A. That is the printed interview; and this is the copy of the interview which was sent.

COUNSEL FOR PLAINTIFF: Now I offer to read that. You may point out before I ask to read this, what changes, if any, were
331 made in that typewritten part, and what the words are that were added in the evening by direction of the Defendant?

A. Shall I read the sentence in which the change was made?

Q. Yes sir.

COUNSEL FOR DEFENDANT: I want to see the paper first; is this another paper (indicating)?

The WITNESS: No, it is a portion of the dispatch. You can tell by the clipping, it will show where it fits in the story.

COUNSEL FOR DEFENDANT: Do I understand the interlineations are all that you refer to?

A. Those are the only changes made.

COUNSEL FOR DEFENDANT: And those interlineations are made in pencil?

A. Yes sir.

COUNSEL FOR THE DEFENDANT: And the underscoring, you had nothing to do with it?

A. No, I think that must have been done——

COUNSEL FOR THE GOVERNMENT: Well I will offer this now, it is in words and figures as follows to wit, and has been marked for identification "B. Doyle."

The COURT: Was there an objection to this?

COUNSEL FOR DEFENDANT: No sir.

The COURT: My suggestion is that you read the typewriting as it was originally, and then, having done that, you call attention to the particular changes that were made in it by the pencil notation.

Thereupon Counsel for the Government read the paper
332 referred to, in words and figures as follows to wit:

"BURTON: I was retained as Counsel for Mr. Dennis during his trouble in the winter of 1892, and 1893. I became associated with Mr. Harlan, his local Attorney, and other St. Louis Counsel in a regular way, and upon the recommendation of mutual friends. I talked over the case with local Counsel in St. Louis, and later Dennis came on here to Washington, bringing a copy of the indictment which had been found against him in St. Louis. I conferred with him about his case, and afterward went to St. Louis and conferred with his local Counsel. While Dennis was here I went with him to the Post Office Department and introduced him to Supt. Cochran, Chief of the Inspection Service of the Department. I told Mr. Cochran that Dennis had been indicted by the Federal Grand Jury in St. Louis, and that I had examined into the case, and as far as I could see, I did not believe that there was a case against him. I wanted to know if there had been any complaint entered against Dennis before the Department, and I was told that there had not. I then told Mr. Cochran that, although I was Dennis' Counsel, I could not be re-

tained to oppose the Department in this or any other matter, and would not do so. I told Mr. Cochran, and I believe he will bear me out in the statement, that both Mr. Dennis and his local Counsel, Mr. Harlan, had advised me that Dennis proposed no violation of the Federal Law, nor would *be* oppose any order or wish of the Department. This was done in the presence of Mr. Dennis, my
333 client. I called at the Department once or twice after that to inquire if any complaint had been lodged there against Dennis, and on those occasions repeated my previous statement that I was not there to oppose the wish, order or rule of the Department in any shape, manner or form. After consulting with local Counsel in St. Louis, as already explained when I was out there during the holidays, we agreed that as Congress was soon to reassemble, it was not necessary for me to remain in St. Louis in the trial of the case before the Courts."

COUNSEL FOR THE GOVERNMENT: Now, that portion of it which has been added I will read the last sentence, as follows:

"I called at the Department once or twice after that to inquire if any complaint had been lodged there against Dennis, and on those occasions repeated *by* previous statement that I was not there to oppose the wish, order or rule of the Department in any shape, manner or form, nor to act as an Attorney before the Department for him."

Cross-examination.

Mr. LEHMANN:

Q. Do you write shorthand?

A. I do not, no sir.

Q. So that, when you say you took notes; you took notes in long hand?

A. Yes sir. Well not in long hand in the sense you use. I have a system of abbreviations that I use, a system of abbreviations, which is very rapid.

Q. But, practically speaking, long hand writing?

A. Yes sir.

334 Q. You have acquired certain abbreviations of your own?

A. Yes sir.

Q. But you didn't take it down stenographically——

A. (Interrupting.) No sir.

Q. (Continuing:) And then you transcribed it afterwards on the typewriter, and he came to see you after you had transcribed it, and these alterations were made, or rather, the pencil interlineations?

A. I made the alterations at his suggestion.

Q. That are indicated on that paper by pencil?

A. Yes sir.

Q. Being in pencil?

A. Yes sir.

Thereupon the Court duly admonished the Jury as to its conduct during adjournment of Court, and the Court here adjourned until Thursday, November the twenty-third (the following day) at ten o'clock a. m.

335 ST. LOUIS, *November* 23, 1905.

Met pursuant to adjournment as above, on Thursday, November 23, 1905, at ten o'clock a. m., when the following proceedings were had:

HECTOR MCRAE, a witness of lawful age, being duly produced, sworn and examined on the part of the United States, testified as follows:

Direct examination.

By Mr. DYER:

Q. State your name in full, if you please?
A. Hector C. McRae.
Q. Were you at any time connected with the Rialto Grain & Securities Company?
A. I was.
Q. From what time to what time?
A. October 20, 1902 until July, 1903.
Q. What position did you hold in the Company?
A. I had charge of the banking and finances; comptroller they called me.
Q. I will get you to state whether the receipts of the Rialto Grain & Securities Company were principally through the use of the United States mail?

Objected to by counsel for defendant as not competent.

The COURT: The objection is sustained. There is evidence tending to show that complaints were made to the Post-office Department which gave rise to an inquiry in that Department, whether or
336 not this Company was conducting a scheme or artifice to obtain money on false pretences, through the mails. We will not go into inquiry as to what the Company was or was not actually doing. It will be sufficient for the purposes of this inquiry that we should be informed that there was an investigation of that matter pending in the Postoffice Department. The questi-n whether or not the Company was engaged in conducting such a scheme, is one over which the Postmaster General would have jurisdiction, and would be a matter for him to determine; and if the proceeding or inquiry were before him, that is all that is necessary for the purposes of this case that we should make inquiry about. The literature which accompanied the letters tends to show that the Company was soliciting the sending of drafts, money orders and remittances to the Company through the mail from the general public to whom the circulars were addressed. That is as far as this matter can be inquired into.

Mr. DYER:

Q. Do you know the defendant, Senator Burton?
A. Yes, sir.
Q. When did you make his acquaintance?
A. March 26, 1903.
Q. Where?

A. In Mr. Mahaney's office, in the Rialto Grain & Securities Company's office.

Q. In this city?

A. Yes, sir.

Q. How did you come to meet him there, and what was said at that meeting?

A. I had some business in Mr. Mahaney's office that morning and I dropped in there and Mr. Mahaney introduced the
337 Senator to me.

Q. What was said, if anything, in that conversation?

A. After the introduction he made some casual remarks and also stated that the Senator had tendered his resignation as counsel for the Company; and that he had given him his check to settle up to date, or words to that effect.

Q. Was there anything further said in that conversation about the reason why his connection then ceased with the Company? If so state it.

A. Well, the statement was made that there was no work for the Senator for some time past, that there was nothing against the Company in the Department at Washington, and as a result his services were no longer required.

Q. State what further was said, if you recollect, at that interview.

A. The Senator stated that the employment, or his connection with the Company had been satisfactory, and that he had felt there was nothing for him to do, and I think before leaving he made the statement that prior to his leaving Washington he had called at the Department and found that there was nothing against the Company, no complaints against the Company.

Q. What Department, did he say?

A. The Postoffice Department.

Q. Is that about all that was said, according to your recollection? Or is it all that was said?

A. There was some talk about the National Securities Company and about the abuse of a letter that had been used
338 by the National Securities Company, to which Senator Burton's name was appended.

A JURYMAN: We cannot hear.

The COURT: Repeat your last answer.

A. Senator Burton had stated that there had been—that he had been causer a great deal of annoyance by a letter which had been used by the National Securities Company, a letter to which his name was appended; and that he did not wish for this notoriety. That was discussed casually, but it did not make much of an impression on me at the time.

Q. Was there anything in that conversation about his willingness to serve the Company further, if required?

A. Yes, sir.

Q. What was said in that connection?

A. Why, he gave his home address in Abilene, Dickinson County,

Kansas, and said that if we required his services at any time he would be pleased to act, if we should require his services as counsel.

Q. Now have you stated all as you recollect, that occurred there in your presence and his presence, in that conversation, so far as you now recollect?

A. Yes, sir.

Cross-examination.

By Mr. LEHMANN:

Q. You were examined on the trial that was had in this room from the 22nd day of March until the 28th day of March, 1904, as a witness?

A. I was.

Q. And on that examination you did not say anything
339 at all about the National Securities Company, or any letter in connection *that* that or any trouble about it?

A. I don't remember.

Q. You don't remember whether you did or not?

A. I don't think I did.

Q. You were asked there about your meeting with Senator Burton, in Mr. Mahaney's office, and you said "It was before lunch. I went in and Mr. Mahaney was there with Senator Burton. He introduced me to him, and said that the Senator had tendered his resignation. That Senator Burton had severed his connection with the Company, or words to that effect; and that he had paid him up to date. That the Senator had felt he was earning his fees, in view of the fact that there had been nothing doing for some time past, and that everything had been cleaned up in the Department; that there were no complaints whatever against the Rialto Grain & Securities Company in the Department in Washington. Mr. Mahaney in introducing him made most of those remarks." You so testified, did you not?

A. Yes, sir.

Q. Then you were asked: "What you have given here as said by Mr. Mahaney or Senator Burton was said in the presence of each other" and you answered "Yes." That is a fact?

A. Yes, sir.

Q. Then you were asked: "Is that all you recollect now Mr. McRae, as occurring at that time" and you answered: "Well,
340 before leaving, or before breaking up, Senator Burton said he would give, or that he did give Mr. Mahaney his address, and that he was always at hand if the Company required him again, and the question of a retaining fee was spoken of; but my memory regarding that is not very strong. I think that was a matter to be left to be taken up later on." You were asked that question and so answered?

A. Yes, sir.

Q. Then you were asked: "I will ask you to state what was said, if anything was said, by Senator Burton in reference to the matters

of the Rialto Grain & Securities Company in the Postoffice Department in Washington being wound up?"

"Judge KRUM: We submit he has stated.

Col. DYER:

Q. State fully if there is anything more in the matter" and you answered: "He said that before leaving Washington he had called at the department and there learned that there were no complaints against the Railto Grain & Securities Company" You were so asked, and so answered?

A. Yes, sir.

Q. That was the whole of your examination in chief?

A. Yes, sir.

Q. Then you were asked by Judge KRUM: "Mr. McRea, the talking on this occasion was done for the most part by Mr. Ma-
341 haney was it not?" and you answered "Yes." Is that correct?

A. Yes, sir.

Q. Then you were asked "You say Senator Burton stated he had been to the Department before he left Washington and learned that there were no complaints against the Company?" and you answered: "Yes."

A. Yes, sir.

Mr. ROBB: I would like to interpose an objection to the reading of the next question. If your Honor will examine it, I think you will apprehend why I object. I do not want to argue it before the jury.

The COURT: I will first ask if counsel for the defense is going to read it?

Mr. LEHMANN: Yes, sir. It is the sole remaining question and I want to bring the whole of the examination of this witness before the jury, to show that there was no allusion in the entire examination to this question of the letter of the National Securities Company.

NOTE.—It is admitted that no allusion was made by the question or answer referred to, to the National Securities Company, and that the questions and answ-rs which were about to be read, have no relation whatever to the National Securities Company matter.

Mr. LEHMANN:

Q. There was an indictment returned against you in the District Court of the United States in 1903, was there not?

A. Yes, sir.

342 Q. Because of your connection with the Rialto Grain & Securities Company?

A. Yes sir.

Q. And that indictment has not been brought on for trial?

A. No sir.

The COURT:

Q. Have you any explanation to make of why the testimony you have given in respect to the National Securities Company was not referred to by you in your former testimony?

A. It was not.

Q. Have you any explanation to make of why it was not, is what I asked you?

A. When I was giving my evidence, your Honor, I did not pay much attention to it; there are lots of little things that happened, a number of minor things that happened that day, which were immaterial, and my memory has been freshened I remember distinctly the reference to the National Securities Company. At the time I was giving my evidence I did not think of it. I did not pay much attention to it at all. And many other things happened that same morning. That was perhaps a half hour desultory conversation and I do not remember all about it. It did not make much impression upon me.

THOMAS B. HARLAN recalled, testified as follows:

Direct examination.

By Mr. DYER:

Q. Mr. Harlan, you stated, I believe, on your examination
343 before, that the message which you sent on the night of November 29th, to Senator Burton, a copy of which had not been preserved?

A. That is a fact, yes sir.

Q. Now you wrote him on the 2nd of December; state whether or not the dispatch which you sent on November 29th, and to which reference is made in your letter of December 2nd, was in effect what is stated subsequently in this letter of December 2nd?

A. Please let me see the letter. (After examining letter) To the very best of my recollection, yes.

Q. What is your answer?

A. To the very best of my recollection, the telegram was in substance the same as the language contained in the letter referring to the telegram.

Q. After this indictment was found against the defendant, did he and you together examine the correspondence that had taken place between himself and you, at your office?

A. Now you refer to the first indictment?

Q. Yes sir, the first indictment—not this last one.

A. Yes sir.

Q. I will get you to state whether or not at that time you showed him copies of letters that you had written to him?

A. Yes sir.

Q. Were there any of those letters thus shown to the defendant by you delivered to him, that are not here now?

A. There were two letters delivered to Senator Burton.

Q. What became of those two letters?

A. Well, I don't know. I gave them to Senator Burton.

Q. Did you have any conversation with him afterwards in
344 reference to what became of those two letters thus given to him?

A. My recollection is that he told me they were destroyed.

Q. Were those letters that you thus gave to him at that time lette signed by Senator Burton himself?

A. I am not right sure whether they were both his letters, or o mine and one his. I cannot state right at this time. There were tw letters. Senator Burton's letter, whether one or two, was signed b him.

Q. In publishing some of the literature, so called, of the Rialt Grain & Securities Company, this defendant's name appeared a counsel for the Rialto Grain & Securities Company; had you an conversation with him before the publication of this literature, tha his name should go on the literature as counsel?

A. Yes sir. In the conversation I had with Senator Burton o the train, I asked Senator Burton if he would permit the Rialt Grain & Securities Company in the event of his employment a counsel, to have his name appear on its literature; and he said. Yes.

Cross-examination.

By Mr. F. W. LEHMANN:

Q. Had those two letters you refer to anything whatever to do with the business of the Rialto Grain & Securities Company?

A. No sir. They were letters of a personal nature.

Q. You had gone over, at the time the Colonel referred to, the letters, originals and copies, of Senator Burton, as I understand it, and he later returned them all?

A. I do not understand that quite.

345 Q. Had you delivered over to him the letters and then he returned them—I mean the general bunch of letters?

A. Whom do you mean by "him?"

Q. Senator Burton.

A. Yes sir.

Q. And those two letters you referred to, you remember their general nature, and that they had nothing to do with this Rialto Grain & Securities Company's business?

A. I do not now remember their contents, but at the time I remember they were letters of a personal nature, and were extracted on that account.

Q. Now, Mr. Harlan, you were asked with respect to a telegram, and you said it was as indicated in the letter of December 2, 1902; I call your attention to the fact that that is a long letter, two typewritten pages; do you mean to say your telegram was substantially that letter in its entirety?

A. No sir. I say that to the best of my recollection the telegram was in substance the same as the language of the letter referring to the telegram. That is as far as I am able to go.

Q. The extract in the letter is this, "On Saturday night I wired you indictment had been returned, bond given, etc." Read the letter and see if that is it.

A. I remember that language, and I know that language is in there.

Q. Isn't that all you have in mind between the identity of the letter and the telegram?

A. I cannot state what the "etc" refers to. I might have added a few words to the telegram, other than the language referred
346 to here (indicating letter), which was a hastily written telegram, sent from Union Station in this city.

Q. But as far as your recollection goes, the telegram was limited to information about the indictment, and the giving of bonds, and things connected therewith?

A. Yes sir.

Q. You have referred to Senator Burton's name going upon literature of the company; do you know whether he ever saw any of that literature?

A. Whether I ever saw it?

Q. No. Whether the Senator ever saw any of it.

A. No sir, I don't know whether he ever saw it.

CHARLES H. BROOKS, a witness of lawful age, being duly produced, sworn and examined, on the part of the United States, testified as follows to-wit:

Direct examination.

By Mr. ROBB:

Q. You may state your name.

A. Charles H. Brooks.

Q. Do you live in St. Louis?

A. Yes sir.

Q. Where did you live from November, 1902, until the last of March, 1903.

A. In this city, namely St. Louis.

Q. And you are the Charles H. Brooks, the originator and for a time the manager of the Brooks Brokerage Company?

347 A. I am.

Q. Did you ever have—whether or not you ever had any connection with the Rialto Grain and Securities Company?

A. I did not.

Q. Do you know the defendant, Mr. Burton?

A. I do.

Q. When did you first meet him?

A. In the early part of January, 1903.

Q. Where?

A. In McTague's Restaurant.

Q. In this city?

A. Yes sir.

Q. Did you have any conversation with him on that occasion?

A. Nothing except social at the lunch table.

Q. Did you see him again that day or subsequently?

A. I saw him again that afternoon, about three o'clock.

Q. Where?

A. In my office in the Equitable Bldg., this city.

Q. And what business were you then pursuing or connected with?

A. I was connected with the National Securities Company.

Q. What was your connection with the National Securities C
pany?
A. Stock-holder and officer.
Q. You were president of the National Securities Company?
A. Yes sir.
348 Q. Who, if any one, besides Senator Burton, was pres
when you saw him that afternoon?
A. Dick Kastor—Richard Kastor.
Q. And whether on that occasion you had any conversation w
the Senator, or with some one else in his presence, and within
hearing, touching the nature or scope of his employment by
Rialto Grain & Securities Company?
A. I did.
Q. State what it was?
A. Kastor told me the Senator was willing to represent the
tional Securities Company before the Postoffice Department—

Mr. LEHMANN: I submit that is not competent.
The COURT: In itself, it is not. We will let the witness ansv
fully.
To which ruling the defendant, by his counsel, then and there,
the time, duly excepted.

A. Kastor told me that Senator Burton was willing to repres
the National Securities Company before the Postoffice Departme
providing we could agree upon terms.
Q. Where was the Senator?
A. He was present in the room, and we were all sitting around t
desk, Senator Burton, Dick Kaster and myself. My answer was th
the business was legitimate, there had been no complaints before t
Department that I knew of, and that I was not anticipating any co
troversy. Mr. Kastor said again that the government was inves
gating all speculative houses in St. Louis, and it was only a questi
of time until that business also was investigated. And
349 said, "If they do investigate you, Senator Burton can be
use to you."
A JUROR: Please speak louder.
Q. Repeat your answer.
A. Mr. Kastor said, when I answered that my business was legit
mate, and that I did not anticipate any trouble, he told me that th
government was investigating all the speculative houses in St. Loui
and that it was only a question of time before they investigated m
business. And he said, "If they do investigate your business Senato
Burton can be of use to you before the Postoffice Department."
Q. What did you say?
A. I told him I did not see in what way the Senator could sto
the investigation, or in what way he could render any assistance
Dick Kastor turned to me, and pointing towards the Senator sai
"Here's the man who has defeated you in your fight against Dennis
and stopped the issuance of a fraud order."
Q. What did you reply to that, if anything?

A. I said "If he has that influence with the Department, I think I had better also employ him to protect this business."

Q. What further, if anything, was said?

A. The conversation after that was general, in relation to the price and terms that was to be paid.

Q. State as nearly as you can just what was said.

The COURT: Is the rest of what you are going to call out, in reference to the Rialto Grain & Securities Co.?

Mr. ROBB: It is not. It is not admissible unless the whole conversation is to be called out.

350 The COURT: You may call out only such part of it as will tend to show what was meant by the particular portion of it relating to the Rialto Grain & Securities Company.

Mr. ROBB: There is nothing further.

Mr. ROBB:

Q. Was that interview of your seeking—whether or not that interview of your seeking?

A. It was not.

Q. You were subsequently indicted, tried and convicted for running a get-rich-quick scheme?

A. Yes sir.

Q. And your case is now in the Court of Appeals, as I understand, on appeal.

A. That is true.

Q. Whether or not you knew that Mr. Dennis was the president and manager of the Rialto Grain & Securities Company?

A. I did.

Cross-examination.

By Mr. LEHMANN:

Q. You say you have been indicted and convicted of conducting a fraudulent scheme: in what connection was that? What was the name of the company?

A. The National Securities Company.

Q. When were you indicted?

A. This last April, I think. I am not positive as to that, but I think it was last April—March or April.

Q. April of this year?

A. Yes sir.

Q. And when were you tried?

351 A. The latter part of June, of this year, I think.

Q. What arrangement has there been between you and the Government with respect to favor or immunity?

A. None whatever.

Q. This testimony is given by you absolutely voluntarily?

A. Yes, sir, absolutely voluntarily.

Q. Volunteered on your part?

A. It was.

A. And not under any promise of any favor or consideration of any kind whatsoever?

A. Absolutely no promise of any favor or consideration.

Q. When did you first tell the government about this?

A. When I was sent for ten days or two weeks ago, subpœnaed.

Q. Never before? They sent for you, and you told them about it?

A. Yes, sir.

Q. And they offered you no consideration?

A. None whatever.

Q. And you expect none whatever?

A. None whatever. I am not asking for any favors.

Q. And not until ten days ago did you ever speak to anybody about this?

A. Perhaps my own attorney, but to no other one.

Q. We cannot inquire of your attorney. The Government just sent for you and asked you about it and you told them?

A. Yes, sir.

Q. And you have told nobody except your attorneys?

352 A. Not that I remember of.

Q. Do you know whether your attorneys have made any arrangement with respect to this?

A. I do not know of any such arrangement, no, sir. If there has been any such arrangement made I don't know anything about it, never heard of it.

Q. Did you tell your attorneys this with the view of having any such arrangement made?

A. No, sir, I did not.

Q. And you did not direct your attorneys to tell the Government?

A. No, sir.

Redirect examination.

By Mr. DYER:

Q. You say you were sent for by the Government: How sent for?

A. I was subpœnaed.

Q. Did you tell your attorneys about this before or after you were indicted? I will be still more specific: Have you said anything to your attorneys about this matter since you were subpœnaed by the Government?

A. I did not.

Recross examination.

By Mr. LEHMANN:

Q. You say you have said nothing to them since you were subpœnaed.

A. No, sir. It has been many months since I spoke to my attorneys.

353 Mr. DYER: I offer in evidence the dispatch that has been identified as being in the handwriting of the defendant, directed to H. C. Dennis.

Mr. LEHMANN: I see no relevancy whatever in that. I do not see any possible conection with anything.

The COURT: I do not see anything on it indicating its date.

Mr. LEHMANN: I think the date of December 17, in red ink there (indicating). I think that is it, but I am not sure, and have no means of fixing it except what your Honor will have, by what is on the paper.

The COURT: The relevancy is not apparent on the fact of the telegram, but if counsel is going to connect it in any way, either to that which has preceded in the evidence or that which may come, it may be introduced.

Mr. DYER: We think it connects very materially with what has transpired. I think it is a legitimate inquiry here, with what has already gone before. I don't pretend to say to the Court that I shall offer any additional evidence to that.

The COURT: It is sufficient if it connects up with anything that has gone before; but just hastily looking at it I do not quite see that it does. Can't you make some statement that will be proper, and which will challenge my attention to the matter?

Mr. DYER: I can recall Mr. McRae. This is in reference to the telephone message he wished to send to Dennis. He was an officer of the Rialto Company, and this shows the connection between the defendant and the President of the Rialto Company, in re-
354 ference to McRae desiring communication with him by telephone on a matter which he says is of great importance.

The COURT: If you want to recall Mr. McRae you may do so.

H. C. McRAE recalled,, testified as follows:

Direct examination.

By. Col. DYER:

Q. I will get you to state whether or not in December, the exact date I cannot give because of a blur on this paper (indicating telegram) but I will get you to state whether or not in December, 1902, you remember of wiring to the defendant, Burton, to call Dennis to the phone, on a matter of great importance?

A. In December, 1902?

Q. Yes.

Mr. LEHMANN: I suppose that telegram would show. It does not follow, even if there was a matter of great importance, that Senator Burton would know anything about what it was. There was a telegram sent to him "Send Dennis to the phone, there is a matter of great importance."

The COURT: If that was all there was of it. I cannot ask him to put everything in one question. I apprehend this is merely a preliminary question.

Mr. DYER:

Q. Do you recall having wired to Burton or anyone else, that you wanted to communicate by phone with Dennis, who was then East?

A. Well, I wired in December—I think I sent about twenty or thirty messages to Dennis.

355 The COURT: We are not making inquiry about telegrams to Dennis, here. They are making inquiry of you only about a telegram or communication of some sort to Senator Burton in respect of a desire on your part, or occasion on your part, to communicate with Dennis over a telephone.

A. Well, it is very simple to explain it. It has no bearing on this case whatever. I wanted to get in communication with——

The COURT: You must not construe whether it has any bearing on this case or not, but state what the facts were.

Mr. DYER:

Q. I will get you to state whether or not you remember sending a telegram to Senator Burton at Washington, in December, 1902, asking to speak with Dennis over the telephone?

A. No sir, I do not remember that.

Q. You do not remember?

A. No sir.

The COURT: The telegram will not be admitted.

Mr. DYER: I offer in evidence a telegram addressed to Thomas B. Harlan.

Mr. LEHMANN: I object to that as irrelevant. It is an answer to some other telegram, which is not introduced or accounted for in any wise, and it is, necessarily, mere speculation what it refers to.

Mr. DYER: Mr. Harlan was asked as to whether or not he sent a message, to which that was a reply, and he said he had no recollection of it, but had hunted to see whether he had a copy.

356 The COURT: I think I know what this is in answer to. The telegram will not be admitted. It refers to an inquiry—I mean to say, my impression from the matters that have been submitted before, it relates to an inquiry addressed to the Senator as to whether he could be of assistance with reference to a proposed investigation here in this State, under the laws of this State. One of the letters offered, or proposed to be offered, had an inquiry of that sort. And this is apparently an answer to it; and, therefore, has nothing to do with this case, unless you can connect it up in a proper way.

Mr. DYER: If your Honor will allow me, the matte*f* you have reference to in your mind, has reference to a telegram sent by Mahaney and not Harlan, regarding an investigation being conducted by a committee of the Legislature, and so on.

The COURT: Whether I be right about that or not, I am a little confused as to Mahaney and Harlan, but this will have to be connected up in some way.

THOMAS B. HARLAN recalled, testified as follows:

Direct examination.

By Mr. DYER:

Q. I show you a telegram dated November 25th, at Washington, D. C., and ask you to look at that telegram and state whether or not you received it.

A. (After examining telegram.) No sir, I never received it. I was on the train that day going to Washington.

357 Q. On the 25th?

A. Yes.

Q. Did you send him a telegram—were you here on the 24th?

A. Yes, sir.

Q. Did you send him a telegram on November 24th with reference to any purpose in St. Louis?

A. Well, I am only able to answer your question by referring to this telegram. I have no recollection independent of that telegram from which I may answer.

Q. Did you preserve a copy of your telegrams?

A. I am unable to say whether I did or not, but I have looked in every place where such a copy would be, to endeavor to find it, and I do not find it. I have been unable to find it.

Q. Then there is nothing in this telegram that calls your mind to what was in your telegram of the day before, to which this is an answer?

A. No sir. I am wholly unable to say.

Q. Were you in Washington in company with Major Dennis?

A. No sir.

Q. Did you know of your own knowledge of a message being sent by Major Dennis to Senator Burton asking to see him in Washington on the following Monday?

A. No sir.

Q. Did you see this message (indicating) directed to Dennis after its delivery here?

A. No sir, I do not remember of ever seeing that before.

358 Mr. DYER: In view of the testimony of Mr. Cochran, of having been introduced to Dennis by Senator Burton on that date, I offer this telegram.

The COURT: That is the only connection you can make?

Mr. DYER: That is the only one.

The COURT: The telegram will not be admitted.

359 ROBERT M. FULTON, a witness of lawful age, being du
produced, sworn and examined, on the part of the Unit
States, testified as follows, to-wit:

Direct examination.

By Col. D. P. DYER:

Q. State your name?
A. Robert M. Fulton.
Q. Did you know James M. Tyner, Assistant Attorney Gener
for the United States?

Mr. LEHMANN: Ought not that be deferred?

Q. Mr. Fulton, what was the physical condition of James M. Ty
ner at the trial of this case, when it was tried before?
The COURT: Can't you give the date?
A. At his trial you mean?

Mr. DYER:

Q. At the trial of Burton.

Mr. LEHMANN: The date of the trial was January, 1904.

A. He was paralyzed, an invalid, and incapacitated.
Q. And how long had that condition existed, so far as you know?
A. Well, for some months.
Q. Prior to that time?
A. Yes, sir.
Q. I will ask you to look at a letter that has been heretofore read
in evidence, of February 11, 1903, signed J. R. Burton; also a let-
ter of January 19, 1903, signed J. R. Burton, and which has here-
tofore been read in evidence, and ask you to state when you
360 first saw those letters?
A. In October, 1903.
Q. Where did you first see them?
A. They were obtained by Inspector Piatt and myself from the
Circuit Attorney's office in the City of St. Louis, Missouri.
Q. And were those letters—I will show you this one also of Jan-
uary 22, 1903.

Mr. LEHMANN: They are the same letters, identified in the for-
mer trial. There is no claim made that they came from Mr. Bur-
ton to the government. I forget just the ones, but they were iden-
tified in the former trial. You can identify them from that record.
Mr. DYER: I wanted to clear up what seemed to be something of
a mist, about where those letters came from into our possession.
The COURT: It is admitted that these particular letters that are
here did not come from the defendant?
Mr. LEHMANN: I assume those are the letters.
The COURT: Look at them.
Mr. LEHMANN: (After examining letters) January 19 and Feb-
ruary 11, 1903,—yes sir.
The COURT: It is admitted that those two letters did not come

through the channel of the defendant's hands, but came in some other way to the prosecution?

MR. LEHMANN: Yes sir.

And the same as to the letter from Dennis to Burton of January 22, 1903.

361 THE COURT: The same is true of the letter from Dennis to Burton dated January 22, 1903.

MR. DYER:

Q. I will ask you whether these letters obtained from the Circuit Attorney's office in this city, whether they were produced by you before the Grand Jury?

A. They were.

Q. And I will ask you to state also whether these various checks that have been read in evidence were obtained at the same time, and from the same source that you obtained the letters?

A. Thy were obtained from the same source and at the same time, from the records of the Rialto Grain & Securities Company, which were in the possession of the Circuit Attorney of the City of St. Louis.

Q. Your position here is what?

A. Postoffice Inspector in charge.

Q. And you were at that time a Postoffice Inspector in the field?

A. Postoffice Inspector in the city of St. Louis.

Q. Acting under Mr. Dice?

A. Mr. George A. Dice, yes sir.

362 The government here rests.

Thereupon Counsel for the Defendant presents the following motion to the Court:

In the Circuit Court of the United States, Eastern Division of the Eastern District of Missouri.

UNITED STATES, Plaintiff,
*vs.*
JOSEPH RALPH BURTON, Defendant.

Comes now the defendant and requests the Court to instruct the jury as follows, viz:

I.

The court directs the jury to return a verdict of not guilty.

II.

The court directs the jury to return a verdict of not guilty as to count one of the indictment.

III.

The court directs the jury to return a verdict of not guilty as to count two of the indictment.

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IV.

The court directs the jury to return a verdict of not guilty as count three of the indictment.

V.

The court directs the jury to return a verdict of not guilty as count six of the indictment.

VI.

The court directs the jury to return a verdict of not guilty as count seven of the indictment.

VII.

The court directs the jury to return a verdict of not guilty as count eight of the indictment.

J. R. BURTON,
By F. W. LEHMANN AND
W. KNOX HAYNES,
*His Attorneys.*

The said Motion was then argued by Counsel whereupon it was overruled by the court and an exception was asked by the defendant and allowed by the Court as to the ruling upon the Motion as an entirety and as to the ruling upon each and every sub-division of it.

Mr. LEHMANN: I move that the government be required to elect as to counts one, two, six and eight, on which they will proceed. And also, that they be required to elect as between counts three and seven as to which they will proceed on.

The COURT: The motion will be denied, and exception allowed.

364 To sustain the issues on his side, the defendant then offered the following testimony:

Mr. LEHMANN: I offer in evidence Secs. 1617 of the Postal Laws and Regulations of date 1902, which is the one in vogue, I believe.

The COURT: Is there any objection?

Mr. ROBB: Yes.

Mr. LEHMANN: That is the section referred to in the jacket already in evidence.

Mr. ROBB: It is conceded it is the same section that appears on the jacket.

Mr. LEHMANN: It is the one under which the investigation is made here. It is the same as Section 5480 of the Revised Statutes of the United States.

The COURT: You may read it in evidence.

Mr. LEHMANN: If counsel concede it is the same as Section 5480, that is all I care for.

Mr. DYER: So far as that is concerned, the Court will take judicial notice of the fact that it is the same as Section 5480.

The COURT: In connection with the introduction of this section

I wish to say, that in judicial and all other proceedings, the character of the proceedings is to be determined by its substance.
365 If it be a complaint, judged by its substance it is not made something else by the label somebody may put upon it.

Mr. LEHMANN: I now offer in evidence the testimony of George A. Dice, which was given by him on the trial of another case between the same parties, he being called as a witness on behalf of the government. That testimony being found on Pages 69, 70, 71, 72 and 73 of the printed record of the case of the United States *vs.* Burton. I take it for granted that the government will make no question on my using the printed record rather than the certified record.

Mr. DYER: No objection is made. George A. Dice, who just testified, is dead, and his testimony is contained in the printed book that Mr. Lehmann has, which may be used instead of referring to the original bill of exceptions filed in this case.

The COURT: The testimony may be read.

Mr. LEHMANN: I believe it has been shown he is dead.

Mr. DYER: He is said to be. It is true.

Counsel for defendant thereupon read in evidence the testimony of George A. Dice, which is in the words and figures following, to-wit:

366 Direct examination.

By Col. D. P. DYER:

Q. What is your name?
A. George A. Dice.
Q. And your official position?
A. Inspector in charge of the St. Louis Division.

The COURT:

Q. Of what?
A. Comprising the states of Iowa, Missouri and Arkansas, with the exception of Kansas City, Missouri, which is excepted.

Col. DYER:

Q. Of the Postoffice Department?
A. Yes sir.
Q. How long have you been an inspector, Mr. Dice?
A. I think about 23 years.
Q. In 1902 and 1903 where were your headquarters?
A. In St. Louis.
Q. Were you Postoffice Inspector in charge at St. Louis at that time—during that time?
A. I was.
Q. And various other inspectors of the Postoffice department reported to you for duty, is that true?
A. Yes, sir.
Q. And at that time how may inspectors were there in this department reported to you as chief?
A. In 1902?
Q. Yes?

A. It varies from twelve to fourteen. I don't remember the exact number.

Q. I show you a paper (marked) "In case 13778 C," and ask you to state whether you ever saw that paper, and if so, when
367 you first saw it?

A. (After examining paper) This paper was received in my office and made a record in my office on the 10th day of November, 1902.

Q. What was done with it then?

A. On November 14, 1902, it was referred to Postoffice Inspector M. G. Price for investigation.

Q. I will get you to state whether or not that, with the number as given on that, has been in charge of your office since the time of the receipt of that letter?

A. It has been.

Q. State whether or not other complaints not included in the complaints of Hout and Evans were subsequently forwarded to you from the Postoffice Department in that same case?

A. They were, and numbered.

Q. Has there ever been, by your office, or by you, a final report, what you call a final report, made to the Chief Inspector at Washington in this case?

A. There has not.

Cross-examination.

By Judge KRUM:

Q. Mr. Price made an investigation with reference to this so-called complaint of Bella Evans and Mrs. Hout after it was referred to him by you, didn't he?

A. He did.

Q. He made a report to you, didn't he?

368 A. I don't recollect that he made any written report.

Q. Did he make an oral report?

A. He made an oral report that he did not conclude his investigation in the case.

Q. Did he investigate it further after he made the oral report?

A. It was again investigated in August, July and August, of 1903.

Q. About what time did he make the oral report to you?

A. I do not recall that.

Q. How soon after the 14th of November, if you can fix the date?

A. It was soon thereafter, because my recollection is he took it up at once.

Q. Within a day or two, wasn't it?

A. I think so.

Q. Now, what was the report that he made?

A. Well, his report at that time was to the effect that the
369 two complaints were not of such a character as to warrant action in the matter of a recommendation of a Fraud Order, or something of that kind.

Q. Do you re-call whether, after having given you that indication,

Mr. Price made any further investigation of the complaint of Bella Evans and Mrs. Hout, do you remember as to that?

A. That may have been taken up in connection with a number of other complaints at the time of the investigation by Mr. Price and Mr. Piatt.

Q. That was later, some time in 1903?

A. Yes sir, that was in July and August, 1903.

Q. You don't re-call, do you, whether—after this matter had first been referred to Mr. Price, and he had given you this indication that you have furnished us—he did anything further until the general investigation of the affairs of the Rialto Grain and Securities Company, which took place in July or August of 1903?

A. In July and August 1903, yes sir.

Q. Mr. Dice, I show you this original record of the office at Washington (handing paper to witness—)"

Mr. LEHMANN of Counsel for Defendant: I suppose it will be admitted that this was the original record of the case at Washington that was handed to Mr. Dice at that time.

The COURT: That is apparent.

(Counsel for Defendant continues reading): Is there anything about it, taking, for instance, that entry in regard to Fravel; is there anything about it that re-calls to your recollection when that
370 was received here in St. Louis, at your office?

A. The Fravel complaint?

Q. Yes. Or is there a record here, Mr. Dice, from which by turning to it you can tell when it was received in St. Louis?

A. No sir, there is not. These files that were forwarded here under the file number are simply filed in the case without any further record in the office.

Q. Do you re-call the receipt of that particular matter here?

A. That particular matter, I do not.

Q. So you would not be able to tell us, perhaps, what action was taken by yourself in regard to it; or have you any definite recollection in regard to that particular complaint?

A. I have no distinct recollection in regard to that particular complaint. If it was sent on the eighth, it should have been received here on the tenth, and would be in the natural course of business, filed in that case "13778–C."

Q. And then it would be turned over, wouldn't it, to some one of your subordinate Inspectors?

A. If the case was in the hands of an Inspector, which was the case on the fourteenth, it was referred to Inspector Price. If that reference had been received after the case had been referred to him, the file would be referred to him for the filing of the case.

Q. It would go into his hands?

A. Yes sir.

Q. Do you re-call whether Mr. Price made any report of any description with reference to this Fravel Incident?

371 A. If the Fravel incident is mentioned it must be in his report of August twentieth 1903.

Q. That is the formal report that was made after that general investigation—I mean along in November, 1903, after the receipt of this paper in your office."

Mr. LEHMANN of Counsel for Defendant: That must be a mistake: that 1903 is meant for 1902.

COUNSEL FOR THE GOVERNMENT: That is evident. You may read it 1902.

"Q. That is the formal report that was made after that general investigation—I mean, along in November" 1902 "after the receipt of this paper in your office, do you recall any report made by Mr. Price in regard to it?

A. No sir, I do not.

Q. This is shown that the complaint of Arthur M. Allan was referred to your office January five, 1903. That would bring it here, say, on the seventh day of January, 1903. Mr. Price had the other matters in charge and that would be sent to him, wouldn't it: the probability is that was turned over to him?

A. If the case was still in his hands that would be referred to him in my office.

Q. And that would be the situation in regard to the complaint of S. A. Warner, which appears to have been sent to your office on the twenty-first of January 1903, wouldn't it?

A. It would.

Q. You are not able to re-call, are you, whether Mr. Price,
372 if he had charge of these last matters, made any report to your office in regard to them until the final examination therein in the Summer of 1903?

A. He did not make a final report, he made a special report in August in connection with Inspector Piatt.

Q. That was the result of a full investigation of the affairs of the business of the Rialto Grain and Securities Company?

A. It was.

Q. Which was begun in July or thereabouts, of 1903, or was it earlier than that?

A. July and August 1903.

Q. During—that month?

Mr. LEHMANN of Counsel for Defendant: I believe that is meant to read—"

"During those months—Mr. Price and who else?

A. Inspector Piatt.

Q. They made a full examination of the affairs of the Company and reported to you as Chief Inspector in Charge here?

A. Yes sir.

Q. And between November and the time of this full investigation, do we understand you that no report was made except as you have indicated, by Mr. Price, in the month of November?

A. No written report that I re-call.

Q. The only report, other than the written one which was made in August 1903, is the oral report you have indicated?

A. Yes sir.

Redirect examination.

373 By Mr. DYER:

Q. Mr. Price was an Inspector under your charge and discretion was he?

A. Yes sir.

Q. All reports made by him or any other Inspector in this division, was to be made to you, and you, as Chief Inspector could approve or reject the report made by your subordinate, is that true?

A. Yes sir.

Q. Now, as I understand you, whatever examination was made by Mr. Price in November 1902, was a report made verbally to you of it in which he had not concluded the examination?

A. That is right.

Q. And that examination of that concern was before you as Inspector in charge from the time it was first made up to the present time?

A. It was.

Q. These reports about which Judge Krum has asked you, in July and August 1903, were partial reports in reference to this particular matter, but no final report has been submitted by you to the Post Office Inspector in charge at Washington?

A. Yes sir.

Q. That is true, isn't it?

A. This case, since its receipt in my office on November tenth, 1902, has been a subject of consideration since that time. There has never been a final report made; the case is still pending in the hands of my office.

Q. And the papers forwarded to you have never been re-
374 turned to Washington?

A. Have never been returned to Washington; they are files in the office; the case taken up by Mr. Price and partial investigation by Mr. Price, and action taken so far as the Court here is concerned, in July and August of Last year.

Recross-examination.

By Judge KRUM:

Q. When did the Company go out of business?

A. The Rialto Grain and Securities Company?

Q. Yes sir?

A. Yes sir I do not know that it is out of business.

Q. Hasn't it been out of business for a good many months?

A. I do not understand so,"

M. G. PRICE, having been heretofore duly sworn as a witness in this cause on the part of the Government, was re-called to the stand, and testifies further on the part of the Defendant as follows to wit:

Direct examination.

Mr. LEHMANN:

Q. Mr. Price, you have already been sworn as a witness in this
A. Yes sir.

The COURT: Mr. Price just talk now so that the Jury can hear you.

A. Yes sir.

Q. And you are the Inspector referred to in the testimony of Geo. A. Dice?

A. Yes sir.

375 Q. He was, at the time referred to in that testimony the Inspector in charge, and you were one of those in the Field?

A. I was.

Q. You were given, in your capacity as Inspector, complaints, which I believe have already been called to your attention made by Mrs. K. C. Hout and Bella Evans?

A. Yes sir.

Q. Against the Rialto Grain and Securities Company for investigation?

A. Yes sir.

Q. Did you make an investigation?

A. I did.

Q. What did you report, as to that investigation, to Mr. Dice?

COUNSEL FOR THE GOVERNMENT: I object to that.

The COURT: The objection will be sustained.

To which ruling of the Court Defendant by Counsel, then and there duly excepted.

Q. I think I called your attention on Cross Examination to notations in pencils on back of these letters (handing witness letters of complainants Evans and Hout)?

A. (Examining letters.) I recognize those.

Q. And I believe in your Cross Examination you stated that they were—I mean in the sense of interpreting them—you stated what they were, where they were abbreviated?

A. Yes sir.

Q. Were those notations memoranda made by you at the time and as the basis of pour verbal report to Mr. Dice?

A. As I recollect it, they are notations showing the condition of those transactions.

Q. Yes.

376 A. (Continuing:) As found in the files of that Company.

Q. And from those, are you able now to state what you found there? simply identifying what you meant.

COUNSEL FOR THE GOVERNMENT: I think in the original exami-

nation, as I re-call it, of this witness, on Cross Examination, all of these notations made upon this paper were gone into very thoroughly, and what each notation meant, and what each letter stood for.

COUNSEL FOR DEFENDANT: I am asking now, of course, for the substance of the result of the investigation.

COUNSEL FOR THE GOVERNMENT: If that is the purpose of it then I object to it, as to what the substance of his report was, or what he found with reference to those matters.

The COURT: If he purpose of your inquiry is to elicit just what transactions had been had by these particular complainants with the Rialto Grains and Securities Company and to elicit the truth or falsity of the complaint which they had made, then, the evidence is not admissible, because we are not here trying the Rialto Grain and Securities Company, but we are trying the Defendant for having, as is charged, agreed to receive compensation for services rendered by him in proceedings before the Post Master General, and for having received compensation when the law contemplates that the Post Master General shall determine the question growing out
377 of these complaints uninfluenced by any services in that proceeding rendered by a Senator in Congress for Compensation.

COUNSEL FOR DEFENDANT: I am not seeking to go into the real merits of these, but with a view to getting simply what he found, and what he reported. I intended to follow that up by asking whether he informed any one connected with the Rialto Grain and Securities Company of the result of his investigation.

The COURT: The testimony will be excluded.

To which ruling of the Court, Defendant, by Counsel, then and there duly *accepted*.

COUNSEL FOR DEFENDANT: Well I will offer now, in order to make the record clear, the identification of the papers.

Q. Did you make a report on August twentieth 1903, you and Mr. Piatt?

COUNSEL FOR THE GOVERNMENT: I object to that.

COUNSEL FOR DEFENDANT: I simply want to identify it. This is simply identification.

378 The COURT: He may ask that question.

A. Yes sir.

Q. Is this your signature to that (handing witness paper).

A. That is my authorized signature; it is not my signature.

COUNSEL FOR DEFENDANT: This is the report of August the twentieth 1903, signed by M. G. Price and W. D. Piatt. Case No. 13778-C, Special. And I will ask Mr. Robb whether this is his letter accompanying it, of date September ninth.

Mr. ROBB: That is a letter from the office.

COUNSEL FOR DEFENDANT: From the office of the Assistant Attorney General for the Post Office Department?

Mr. ROBB: Yes sir.

COUNSEL FOR DEFENDANT: Now, I offer first the special report and in connection with what I have stated hitherto, I offer it as bearing upon the question of what was the subject for investigation. I offer in connection with it also, the stamp, showing its receipt in Washington in the office of the Chief Inspector.

The COURT: What did you say the purpose was?

COUNSEL FOR DEFENDANT: In addition to what I have stated hitherto, during the course of the Government's case, that it bears upon the question of what was the subject matter of investigation.

The COURT: And these are papers which were written, signed, and filed, all after April of 1903.

COUNSEL FOR DEFENDANT: Yes sir.

379 The COURT: The papers will be excluded.

COUNSEL FOR DEFENDANT: I now make the same offer with respect to the letter of September ninth, 1903, signed by Mr. C. H. Robb, Assistant Attorney General for the Post Office Department.

The COURT: The same ruling.

To which rulings of the Court, as above, Defendant, by Counsel, then and there duly *accepted*.

Note.—A copy of said Special Report, dated St. Louis, Missouri, August the twentieth 1903, together with the stamp there on showing its receipt in the office of the Chief Inspector at Washington; and also copy of the letter signed by Mr. C. H. Robb, Assistant Attorney General for the Post Office Department of date September ninth, 1903, is in words and figures as follows to wit:

All of which, as set out above, being excluded by the Court, and exceptions saved as heretofore noted.

380 "Subject: Rialto Grain and Securities Co.; alleged fraudulent use of the mails.

Return this letter with your reply.
Case No. 13778–C, Special.
M. G. Price,
W. B. Piatt
Post Office Inspector.

Post Office Department Office of Post Office Inspector.

ST. LOUIS, MISSOURI, *August* 20, 1903.

P. O. Department
Div. of P. O. I. & M. D.
Distributing Desk
Sep. 2 1903
Received
Washington, D. C.
(Stamped)

Hon. Geo. A. Dice, Inspector in Charge St. Louis, Missouri.

SIR: We have the honor to submit the following preliminary report in case of above number, relative to the fraudulent use of the mails in violation of section 1617 of the Postal Laws and Regulations

of 1902 by the "Rialto Grain and Securities Company" of St. Louis, Missouri.

The investigation was based upon a number of complaints received from various sections of the country, which alleged that the complainants had been defrauded of their investments by reason of the Company's failure to comply with instructions.

The investigation was begun on the 27th. ultimo and reached a conclusion this date, when the evidence was submitted to Col. D. P. Dyer, United States District Attorney at St. Louis, Missouri, who directed that the evidence be held in abeyance until the October term of the Federal Grand Jury in St. Louis.

The investigation disclosed the following facts. The Company was incorporated September 5, 1902, under the laws of the State of Missouri with a capital of $25,000.00, with $24,600.00 stock in the hands of Major Hugh C. Dennis as President, the other four
381 shares being distributed as follows: one share each to W. M. Leftwich, Vice-President; W. D. Mahaney, Secretary; Geo. Munsa, Auditor, and D. A. Hickey. This organization existed until December 31, 1902, when a reorganization was effected as follows: W. D. Mahaney, Vice-President; A. D. Hardy, Secretary; H. McRea, Comptroller, and D. A. Hickey, General Operator. The auditor, Chas. L. Gould, held no stock nor executive authority under this organization. The officials holding the four shares, with the president, which Major Dennis continued to be, constituted the directors of the company. This organization existed until August 19, 1903. The period covered by this latter organization is the one also covered by the complaints and by our investigation.

The purpose of the company is set forth in paragraph VII of its articles of incorporation, to wit: "Seventh. The purposes for which this corporation is formed are to buy, sell and deal in all kinds of grain, seeds, cereals, provisions, cotton and bonds and securities of all kinds, except stock of other corporations, on its own account or acting as agents for others; to do a general brokerage business; to own real estate and to buy, sell and deal in same on its own account or for others; to build, lease, own, operate and control elevators and warehouses in the State of Missouri, or elsewhere; to do a general merchandise business and do generally whatever may be necessary to carry on its own business."

The management of the company was under the direct control of the president from its beginning until some time during the first week of February, last, when, Major Dennis' health having failed, he was
382 taken in an unconscious condition to Los Angeles, California, where he remained until his return to St. Louis July 23, 1903, resuming control July 28th.

During Major Dennis' absence the control of the company was vested in Vice-President W. D. Mahaney and his associate officials, their authority being confirmed by the board of directors at a meeting held February 27th, 1903, as shown by records and minutes of the Company. Exhibit "A" sets forth in detail the organization, officials, purposes and the condition of Major Dennis during his absence, as submitted over his own signature.

The principal business of the company was to induce customers to deal in corn options. Their customers were sent contracts, or confirmations of transactions, which included, in minor print, the following article, or agreement, to wit:

"All orders for the Purchase or Sale of any article are received and executed with the distinct understanding that Actual Delivery is contemplated where order is executed and that the party giving the order so understands and agrees.

This Company reserves the right to close this contract without notice whenever it would be in the judgment of its officers to the interest of the holder; to increase or decrease margins as occasion may require; and to settle contracts in accordance with ruled and customs of Exchange when order is executed."

Exhibit "B" is a form actually used and it accompanies the papers of one of the complainants.

The company's literature suggested the purchase and sale of corn, thereby increasing the customer's holdings when the market was rising, or their loss if on a decline below the margins. The deals were placed on a 2 cent margin, unless otherwise ordered by the customer, and were subject to the control of the customer at all times, but the company was usually instructed to act on its own judg-
383 ment. This gave rise to complaints when losses occurred, although readily approved if profits were made, as shown by testimonials in some of their booklets.

Complaints arose from several causes. A customer who had authorized the company to use their own judgment would receive notice by mail that his deal had been closed at a considerable profit and re-invested. This information would sometimes cause the customer to reply by letter ordering his deal closed and money remitted; but, during the interval that this correspondence was passing, the company might have made another turn in the deal changing the results materially; sometimes increasing, at other times diminishing the profits and principal. Other customers would reply to the company by telegraph ordering deals closed and money remitted, but in numerous instances the telegrams were either received after market hours or late in the evening, and instructions would not be complied with until the following day, when the market price would have changed, on many occasions, the customer's gratification to disappointment and loss. In still other cases instructions that were properly sent to the company were ignored and violated, and this caused many complaints where the result was a loss to the customer. In fact complaints arose from many causes, some justified and some not.

Complaints seem generally to have been given consideration, and adjustments made, or proposed, but these were often unsatisfactory to the patrons. In our investigation we examined into the cause of numerous specific complaints. Though there seemed many ir-
384 regularities we find that the company assumes the responsibility for the failure to comply with the customer's instructions, and settlements are being made on that basis. Major Dennis repudiates failure on the part of his company to comply with patrons

orders and insists on settlement with them in a manner that would have agreed with instructions.

The complaints mentioned above were those of ordinary occurrence, due to causes explained, but the deal which caused the greatest complaint was that of June 17, 1903, when all ledger balances due customers were re-invested, contrary to instruction in most instances. The customer in each case was notified of this transaction by letter of same date, a press copy of which accompanies this report as Exhibit "C."

We are of opinion that this letter of June 17th. constitutes the basis of prosecution, and U. S. District Attorney D. B. Dyer concurs in this opinion. Whether President H. C. Dennis, who was absent at that time will be implicated by the Federal Grand Jury or not is a question for future determination. The responsibility for this act, as shown by the directors' meetings and authority of officials controlling the concern, seems to have rested with W. D. Mahaney, Vice-President, but acting President; A. D. Hardy, Secretary, who personally dictated the letter, and H. McRea, Comptroller.

Major Dennis informs us that the company assumes the attitude of a dealer and sells directly to the customer such amounts as he chooses to purchase; that the company's policy was to secure itself by purchasing to the extent of 25 per cent. of the amount of money received from customers; for illustration, should the company receive $4,000.00
385 from customers the company would purchase $1,000.00 worth of grain, assuming responsibility for 75 per cent. of their sales to patrons. This in the common parlance of grain dealers is called "hedging." He maintains that such a method is safe, but that during his absence the officials in charge failed to carry out his policy and that their failure to do so and to comply with the instructions of the customers have left the company in serious financial straits.

As stated before our investigation covered the period from January 1st. to July 31st of 1903. This was principally due to the fact that the officials of the original organization had been dismissed and the books closed, also because few complaints existed prior to the beginning of this period. The transaction of business during this period is summarized as follows:

| | |
|---|---|
| Cash received from customers | $386,432.39 |
| " " " sundries | 75,271.65 |
| " paid to customers | 220,791.54 |
| " invested by company in margins | 53,803.99 |
| " expended by company (expenses etc.) | 188,443.14 |
| " in bank July 31st | 1,334.33 |

A recapitulation shows the following:

| | | |
|---|---|---|
| Paid out by company | | |
| Customers | $220,791.54 | |
| Margins | 53,803.99 | |
| Expenses | 188,443.14 | |
| Total expenditures | | $463,038.67 |

| | |
|---|---|
| Received by company | |
| Customers | $386,432.39 |
| Sundried a/c | 75,271.95 |
| Bank a/c | 1,334.33 |
| 386 Total of receipts | $463,038.67 |

This summary includes the deals wrongfully made June 17th. In justice to Major Dennis it should be stated that he has repudiated the action of this date and that he has ruled that all the balances invested at that time shall be reinstated as they were prior to June 17th., these balances having been called for repeatedly by the customers at various times before that date. these calls were ignored by the officials then in charge. The investigation discloses the balance in bank June 17th. was $1192.86 and, assuming that all the monies used by the company for the purchase of margins in June had been invested at that time, the total cash of the company would be $3,609.15, the marginal investments having been $2,416.29. This fact indicates the motive of the letter of June 17th, and shows that the compan- was unable to settle with its creditors at that time, and this plan seems to have been adopted to evade payment. Had this mov- been acceptable to the customers and no complaints been made, not one would have received a penny, for on June 20th. the purchases that the company had thus attempted to force them into exhausted their margins and their trades were closed. This re-investment having been repudiated by Major Dennis, the liabilities to this class of customers amounted to $15,976.31, which represented an original investment of $6001.57. This $15,976.31 liability has been reduced by settlements to $10,875.82, and this is being reduced daily.

The list of creditors in total, covering all complaints heard from, amounted July 31st, to the following:

| 387 Liabilities | Originally Invested | Ledger Credits |
|---|---|---|
| Accounts | $17,407.76 | $23,738.82 |
| Investment June 17" | 6,001.57 | 10,875.82 |
| Margins | | 4,225. |
| Claims unpaid | 1,095.44 | 3,978.46 |
| | $24,504.77 | $42,818.10 |

These assets of the company, which attempt is being made to convert into cash to liquidate these liabilities, are as follows:

| | |
|---|---|
| Accounts dur company | $6,707.48 |
| Stock in "East Shore Wooden Ware Co" | 50,000. |
| Stock in the Monticello Hotel, St. Louis | 11,000. |
| Stock in "Worlds Fair Top Co." | 3,000. |
| Foreign Rights Stock in same company | 2,250. |
| Note against same company | 4,200. |
| Furniture and fixtures | 16,840. |
| Margins up on trades | 805. |
| Cash in bank | 1,353.47 |
| | $96,155.95 |

The liabilities as given above were taken from the company's books and are reasonably accurate. An examination has been made of the assets and we are satisfied that they are sufficient at least to meet the liabilities, which Major Dennis seems honestly disposed to do. From these assets it would appear that he could realize an ample income on which to*m* live, even with his expensive tastes, and the legal opinion is advanced by members of the bar here that these assets could not be reached by the creditors of the Rialto Company. The ques-
388 tion as to whether or not Major Dennis is moved in his determination to settle all claims by a strictly moral purpose, as he protests, or a belie*ve* that it will advertise his company and enable it to continue business, thereby bringing him still greater income, is a matter of opinion. In fact Major Dennis hopes to save the greater part of his present holdings by settling with his creditors from future receipts of the Rialto Company. It has been agreed between him and certain attorneys here in St. Louis who represent creditors of the company that he shall be allowed from 30 to 60 days in which to realize sufficiently from his assets to meet his obligations.

In view of the fact that the total ledger credits, as the accounts stood at the time of the agreement so much exceed the customers' original investments and the company's ready cash was so limited, the creditors' attorneys have themselves suggested a compromise settlement, which is satisfactory to Major Dennis. Along this line letters have been sent out to creditors who have employed no attorneys, asking for approval of the agreement.

The business of the company now amounts to almost nothing. This is believed to be due to the mismanagement of the last few months and our investigation may have contributed to this end. That Major Dennis intends to re-establish the business is shown by his circular letter of August 20th, referring to his "Booklet of Decem*v*er Corn"—Exhibit "D."

Exhibit "E" covers statements of the accounts from January 1, 1903, to July 31st of president, vice-president, secretary, comptroller and auditor. From this it will be seen that they drew out of the company $33,533.86, of which amount Major Dennis drew
389 $9,656.83. Of the balance $10,550.00 went as salary to the latter four officials, the vice-president and the secretary drawing a salary of $500.00 per month each; the Comptroller, a salary of $300.00 per month, and the auditor, $150.00 per month from January to March, inclusive, and $250.00 from April to July, inclusive. By the four latter officials there was overdrawn, above their salaries, $12,691.99.

Vice-President Mahaney says his overdrawals, which seem to have amounted to $4,361.70, were expended in margins for the company and in entertaining the committee of the state senate at the time that the latter were investigating the company in March. Why the marginal investments were made with money charged to him and he was credited with no returns from these he seems unable to explain, and no records of his purchases were obtainable except a $*i*,000.00 purchase made in Chicago, Illinois. He says that it was agreed by the officials in charge at the time that he should be given free lance in

entertaining the senate investigating committee as the best means of securing a favorable report by the committee, and in this statement he is supported by Secretary Hardy and Comptroller McRea.

Secretary Hardy's overdrawals are comparatively small, amounting, apparently, to $470.10. This likely resulted chiefly from recklessness, as Hardy was drunk much of the time during the later months of Dennis' absence, according to the testimony of his fellow officials.

Comptroller McRea's overdrawals of $7,859.23 resulted largely from appropriations of monies from the company in the purchase of stock in the "Worlds Fair Top Company," a concern promoted by McRea for the manufacture and sale of a top novelty and
390 whose stock is of doubtful value. The cash credits in his account are chiefly of stock of this novelty company turned over to the Rialto Company, making the latter virtually a purchaser of the stock of another company, contrary to the declared purposes of the company, as quoted from the seventh article of incorporation in Exhibit "A." Since his return Major Dennis has perfected the deal of this novelty stock and he now holds enough of that, with a note from McRea, to cover the latter's overdrawals from the Rialto Company.

Auditor Gould's overdrawal of $96.00 resulted simply from an advance of salary made to him by Major Dennis after the Major returned and resumed control.

It will be observed that the $12,691.99 overdrawn from the company by the officials in charge during Dennis' absence approximate the difference between the $15,976.31, the amount of the ledger credits re-invested June 17th, and the balance in the bank on that date, $1,192.86—Exhibit "F."

| | |
|---|---|
| Ledger credits June 17th..... | $15,976.31 |
| Bank balance ..... | 1,192.86 |
| Deficit ..... | 14,783.45 |

The conclusion seems justified that these officials, realizing that they could not replace the money that they had embezzled, decided by the bold stroke of July 17th to wipe out these balances. These creditors were notified by the confirm enclosed in the letter of that date that corn had been bought at a certain price. On June 18th another turn was made. The corn was sold again at an advance price and a re-investment again made at slight decline in the mar-
391 ket, which purchase exhausted on the 20th. A telegram went out on this day to each of these customers notifying them to the exhaust of their contracts and calling for remargins, which of course few of them could afford, on such quantities of corn as it was represented they were then holding, even if they had felt disposed to do so.

This telegram was followed by the letter of June 20th.—Exhibit "G."

The liability referred to as that of June 17th was the amount of

unworking balances on the books. This should be distinguished from the further liabilities represented by *working balances*. This unworking balance resulted from deals that had been closed prior to this, weeks before in many instances, in accord with orders from the customers, whose further orders to remit the balance due were ignored.

However much Major Dennis may be held responsible for the conduct of his company during his absence, it must be admitted that he is severe in his denunciation of all the officials who could have figures in the manipulation of the deal of June 17th and he declares he will prosecute them for embezzlement. All connection between the company and Mahaney, Hardy, McRea and Gould has been severed. In the event of prosecution that does not include Dennis he and his attorney, Mr. Thos. B. Harlan, would prove valuable witnesses for the Government. It is believed however, that the evidence will be complete without them.

It will be observed that the resumption of control by Dennis, as stated by him, and the beginning of our investigation were co-incidental. As the conditions were gradually unfolded during our investigation, Major Dennis protested his ignorance of affairs and his disapproval of all irregular deals. Whether or not the in-
392 vestigation and its findings influenced the Major into an attitude that he would not have assumed otherwise, is a matter of conjecture.

Major Dennis and Mr. Harlan accorded us most courteous treatment and seemed disposed to facilitate the investigation all they could. Every call was met with prompt and satisfactory response, even if it required the employment of many of the large number of employees.

Major Dennis, who it must be understood is the "company" when he is at his post, represents to us that the company are dealers in grain and not brokers only, so that he has the advantage of not having to show where he has made purchases sufficient to cover those directed by his patrons. His literature is so worded, however, as to lead his customers to believe that the company merely acts as an agent. Otherwise it would appear that the customers must realize that they are simply making wagers on futures with the company in whose hands they place their money and in whose hands is the machinery with which to manipulate the deals. They must realize further that the company, whose existence depends on the exhausts of its patrons' contracts, will manipulate the deals to its advantage and not against it.

As per the quotation on page 3 of this report from the contracts, or confirms, the company reserves the right to manipulate the deals in accord with the judgement of its officers. In the circulars and letters, however, customers are advised that their instructions will be obeyed faithfully.

Aside from the very alluring nature of the company's advertising, indicating to would be patrons that grain, especially corn,
393 is bound to be short for a future delivery, that the option advertised is likewise certain to rise to a sensational price

and that investors therefore have hardly a chance of losing, the misrepresentations seem few and not extraordinary, as advertising by companies of this character goes. As per the marked passage in paragraph 3 of the fac simile letter of June 6, 1903, under Exhibit "H," the claim is made that the company has had many years of experience, while Major Dennis' experience of two years in the grain business is the longest that any one of the company has had, according to this admissions to us.

Among the complaints that came to us were two from former customers to the effect that an earlier circular issued by the company gave a resume of the deals of the company with each of them that misrepresented the facts, and the investigation proved these complaints true. A call made on the company's book-keeper developes the fact that at least three of the customers paid in more than represented in cimilar summaries of their deals in the latest circular issued by the company, as per the checked names in the "Booklet of December Corn" and the accompanying statement of each made by the book-keeper—Exhibit "D."

B. S. Brooks, Glade Springs, Virginia, is represented as having drawn out of the company $1,083.00 on an investment of $250.00, while in fact he sent the company in all $550.00.

E. H. Dunlap, Como, Mississippi, is shown in this booklet to have received $1,735.32 on an investment of $75.00, while he really invested $939.90.

Dr. B. H. McMullen, Cadillac, Michigan, appears to have won $1,340.53 on a $50.00 investment, but the book-keeper's statement makes his investment $800.00.

394 In each case it is admitted that the customer made good profits as the real facts were. It is presumed that a further examination of the accounts represented in this booklet might prove that the profits were not quite so phenominal as represented.

Of the number of these companies that have recently flourished in St. Louis it is believed that the Rialto Company has dealt most fai-ly with its customers. From the statement of receipts and disbursements, under Exhibit "I," it will be seen that of the $386,432.39 the company returned $220,791.54 to its patrons. Whether or not this large percentage of repayments to customers resulted from the mismanagement of the officials in charge during the absence of Major Dennis or to a strict regard for fair dealing is unknown. During January, however, the Major was in control and the receipts from customers amounted to $76,314.29 and the disbursements to them to $33,847.00 considerably less than half.

Under this same Exhibit ("I") it will be observed that the expenses of the company were $188,443.14, which seems enormous. As per Exhibit "J," list of employees and their salaries, it will be seen that liberal salaries have been paid and about 100 men women and children are employed, the names of the employees in the fac simile department not being given here. The company was equally lavish in all other expenses. The furniture in the offices cost over $16000.00.

After several consultations were held with District Attorney Dyer

as to the advisability of causing the arrest of the four officials who had charge during the absence of Major Dennis, all of whom are Canadians and likely to remove to Canada at any time, Col. Dyer, as stated above, finally decided to order no arrests at present.
395 This was due to the well known ruling of Judge Adams that all option concerns conduct a gambling business and that all customers become such with a knowledge of this fact and with intention themselves to gamble, and he holds that they are therefore not entitled to the protection of his court. This opinion of Judge Adam's was rendered at the close of the trial of the "Brooks Brokerage and Commission Company," as reported in Case # 11379-C by Inspectors Sullivan and Price January 22, 1903, when Major H. C. Dennis, Chas. H. Brooks and Thos. W. Garland were released after a scathing lecture had been administered to them by the judge. A similar opinion in a similar case was rendered by Judge Adams in the case of "The Henry Gradford Brokerage Company" in 1900, as reported by Inspector Sullivan in Case # 357691-C May 28, 1900.

The investigation of the Rialto Grain and Securities Company was entered into and made most thorough in spite of these rulings for the reason that it was believe- that an indictment might be drawn against these ompanies that might make possible a successful prosecution, and hopes are still entertained that a way may be found to accomplish this most desired end, as per District Attorney Dyer's statement that he will "place the whole matter before the Grand Jury, after it shall receive the charge from the court in reference to what he believes to be the law"—Exhibit "K."

A complete list of the circulars, circular letters etc. is forwarded with this report under Exhibit "H."

This report and the evidence are submitted without recommendation for whatever action the Department may see fit to take. As "bucket shops" that are conducted through the mail exist it is believe- that the Rialto Company has conducted a fairly honest
396 business, with the exception of the deal of June 17th, and we are therefore disposed to accept District Attorney Dyer's advice to recommend no fraud order. For the value that the papers herewith forwarded may be in *in* the case of prosecution it is recommended that they be returned as soon as they have served their purpose with the Department.

Very respectfully,

(Signed) M. G. PRICE,
(Signed) W. B. PIATT,
*P. O. Inspectors.*

G. C. W. E. W. S.

Office of the Assistant Attorney General for the Post Office Department, Washington.

SEPTEMBER 9, 1903.

P. O. Department
Div. of P. O. I. & M. D.
Distributing Desk
Sep. 2 1903
Received
Washington, D. C.
(Stamped)

Hon. J. L. Bristow, Fourth Assistant Postmaster General, Div. of P. O. I. & M. D.

SIR: I have considered the report of the Post Office Inspectors and the papers submitted in the case of the Rialto Grain and Securities Company of Saint Louis, Missouri, and in accordance with the recommendation of the inspectors, will close the case without further action by the department at this time.

I wish to state to the Inspectors the position I shall take in
397 regard to the companies engaged in business such as this company is. If, as in the case of the Merchants Brokerage and Commission Company, evidence can be obtained tending to show that the companies do not actually invest the money which is sent to them, or invest it differently from what they represent they will do, I shall regard the business so conducted as in violation of the fraud statutes. While it may be true that so long as these companies invest the money placed with them, in good faith, in stocks, or grains, etc., they are engaged simply in a gambling business, and not in a business in violation of the fraud statutes, yet, when they do not invest the money, or invest it in other ways than they represent, and divert the money to their own use, I regard such facts as sufficient upon which to base a recommendation for the issuance of a fraud order. I also regard the representations which are made by the Rialto Grain and Securities Company about the amount of profits which have been earned by the company for investors, as set forth in the report of the inspectors, as false and fraudulent, and when money is obtained even for the purpose of investment upon such representations, the fraud statutes are violated.

If all possible evidence will be collected along these lines, I shall be glad to call upon these companies to show cause why a fraud order should not issue against them, at any time the Inspectors see fit to make such recommendation. It may be that the Inspectors will desire to return this case with such recommendation after the criminal proceedings are over.

Very respectfully,
(Signed) C. H. ROBB,
*Assistant Attorney General for the*
*Post Office Department.*

398 THOMAS B. HARLAN, having been heretofore duly sworn as a witness in this cause on behalf of the Government, was recalled to the stand and testified further on the part of the Defendant as follows to wit:

Direct examination.

Mr. LEHMANN:

Q. Mr. Harlan you have been examined heretofore, in this case, have you not as a witness?

A. Yes sir.

Q. Did you have any conferences with Senator Burton with respect to the indictment against Dennis?

A. Yes sir.

Q. When?

A. I had a conference with Senator Burton in Washington—I was there the twenty-sixth, twenty-seventh and twenty-eighth of November—during that period I had conferences with Senator Burton, and subsequently, in the City of St. Louis, on the twenty-fourth day of December. And again, my recollection is, on the sixth of January 1903.

Q. I won't ask you as to the details of that at all; but, in a general way, did you go over the Dennis case thoroughly with him, as associate counsel?

A. Yes sir, in each of those conferences, except the last, which was a very short talk.

Q. Senator Burton, when it came to the actual trial of the case, did not participate—that is, in the Court Room trial?

A. He did not.

Q. Why was that?

COUNSEL FOR THE GOVERNMENT: I object to why he did not.

399 THE COURT: That may be answered.

A. Because it was deemed advisable not to have too many Counsel. Judge Krum advised it—that we do not weigh the case down with Counsel at the trial, so that he and I conducted the trial.

Q. The trial was in fact then conducted by Judge Krum and yourself?

A. Yes sir, principally by Judge Krum.

Q. Now, in connection with this same case, I will ask you if Mr. Dennis wanted other Counsel in addition to yourself, Judge Krum and Mr. Burton, employed?

COUNSEL FOR THE GOVERNMENT: I object to that.

COUNSEL FOR THE DEFENDANT: I offer that to show that the employment—as tending to show that the employment of Senator Burton was actually for the purposes of that case, and that the Defendant in that case was not even satisfied with the number of Counsel that he did have, and it was only upon the insistance of his Counsel that he didn't engage others.

The COURT: I am not sure that I appreciate your purpose. It occurs to me that this matter has no bearing here; whether Mr.

Dennis wanted other Counsel or not, because it was an indictment against him, in which he was the Defendant, and in which he might employ all the Counsel he wanted. Mr. Dennis, I understand, was being tried for no transactions with respect to the Rialto Company, but for some other Company. Your view is that this will bring light in what way?

400 COUNSEL FOR THE DEFENDANT: In showing the employment of Mr. Burton for the purpose of the indictment against Dennis, and that it was bonafide. I propose to show by this witness that he actually brought a magistrate from Montreal, and Judge Krum objected to the Barrister appearing, and that he proposed the employment of Counsel in this City, and that Messrs. Harlan and Krum insisted that that was not necessary. In other words, it has a bearing upon the bonafides of the employment of the Defendant with respect to the Dennis indictment.

The COURT: The question will not be answered. Anything that this witness can offer, or knows, in respect of the claim that this Defendant was actually employed for the purposes of the Dennis case by the Rialto Grain and Securities Company may be offered in evidence.

To which ruling of the Court Defendant, by Counsel, the- and there duly *accepted*.

Q. I believe you stated on your Cross Examination in the Government's case that the Dennis case was the immediate occasion for the employment of Senator Burton?
A. Yes sir.

Cross-examination waived.

Thereupon the Court duly admonished the Jury as to its conduct during adjournment, and the Court here adjourned to Friday, November the twenty-fourth A. D. 1905 at ten o'clock a. m.

401 ST. LOUIS, FRIDAY, *November 24th*, 1905.

Met pursuant to adjournment as above, on Friday, November 24th, at ten o'clock A. M., when the following proceedings were had.

The COURT (addressing Mr. Lehmann): My inclination is that you are entitled to show, that the local inspectors here, or one of them, to whom the complaints against the Rialto Grain & Securities Company were referred for investigation, made some sort of investigation, preliminary or what not, and made a report upon it, I think described as an oral report, but as to that I am not speaking as to what the testimony will be. That is a question to come. I am only indicating the line. I think Mr. Dice said, describing it, that it was to the effect that the investigation, so far as made, did not justify, in the judgment of the particular inspector, the issuance of a fraud order, or anything of that kind.

402 Now I shall permit you to show that preceding the negotiations with the defendant, that state of affairs had arisen and occurred, and that it had been communicated in some way to the Rialto Grain & Securities Company, and Mr. Harlan, who was the

representative of the Rialto Company, and I shall permit you to do that with the view that it would have some bearing, the extent of which is to be determined by the jury, upon the question of whether the company at that time believed it had any occasion to employ counsel to protect it against proceedings in the Postoffice Department; and, therefore, some bearing, the extent of which is to be determined by the jury, on the question of whether or not the agreement, if it was made, included any services before the Postoffice Department.

Mr. LEHMANN: I understand. I shall fix the date.

403 M. G. PRICE recalled; a witness of lawful age, being duly produced, sworn and examined, testified as follows:

Direct examination.

By Mr. LEHMANN:

Q. Mr. Price, your attention has already been called to the letters of Bella Evans and Mrs. K. C. Hout, and I think you have stated that you made an investigation with respect to them: I*i* will now ask you whether you are able to state the date of that?

A. November 14, 1902.

Q. Now I understand you made an oral report to the Inspector in charge of the division, that is, Mr. Dice: Now what was the nature of that report? I do not ask for any details of your investigation, but what was the nature of that report as to recommending or not recommending a fraud order?

A. That those preliminary papers did not warrant the complaint.

The COURT:

Q. When you say that, do you mean that is the report you made to your superior?

A. Yes sir.

The COURT: That is the question, what report you made.

Mr. LEHMANN:

Q. Did you inform anybody connected with the Rialto Grain & Securities Company of the conclusion you reached?

A. That would occur in their producing the evidence to show their manner of dealing in the contracts.

404 Q. Did you inform some one there?

A. When they would——

The COURT: Listen to the question and answer it directly.

Q. Did you inform some one there?

A. I do not recollect that I made such a statement. It would be natural in answering my question——

The COURT: Now wait.

Mr. LEHMANN:

Q. You showed them these letters?

A. Yes sir.

Q. And they showed you the books?
A. They showed their files in those two cases. Yes sir.
Q. And you made the report that you did to the Inspector?
A. Yes sir.
Q. Whom did you talk with in the company there?
A. Mr. Harlan had the records of the company.
A. And under his direction you made the investigation—I don't mean under his direction; but I mean, he being there, on behalf of the company?
A. He was the gentleman I was always referred to by the President of that institution.
Q. I am speaking of this particular time, November 14, 1902?
A. Yes sir.
Q. And he showed you the papers, and you went over them with him?

A. Yes sir.

405 Q. Did you on that occasion, to Mr. Harlan, or any other person connected with the Rialto Grain & Securities Company, express in substance or effect, your satisfaction with the showing they made?
A. I was satisfied——
Q. I am not asking you whether you were or not. I am asking you whether or not you expressed to them your satisfaction with the showing they had made?
A. I do not recall that, if I did.

Cross-examination.

By Mr. DYER:

Q. Your examination was made by you as Postoffice Inspector, and reported by you to your superior officer, as you have stated, was it?
A. Yes sir.
Q. You made no report to any one else except your superior officer, of what you concluded?
A. No sir.
Q. Neither to Mr. Harlan nor to any one else?
A. No sir.

406 J. R. BURTON a witness of lawful age, being duly produced, sworn and examined, on the part of the defendant testified as follows, to-wit:

Direct examination.

By Mr. LEHMANN:

Q. What is your name?
A. J. R. Burton.
Q. How old are you?
A. Fifty-five.
Q. You are United States Senator from the State of Kansas?
A. I am.

Q. When did you qualify as such?
A. On the 4th day of March, 1901.
Q. You are the defendant in this case?
A. I am.
Q. W-re you acquainted with Mr. Hugh C. Dennis in his life time?
A. Yes sir, slightly.
Q. And with Mr. Thomas B. Harlan—are you acquainted with him?
A. I am. Yes sir.
Q. When did you first meet Mr. Hugh C. Dennis?
A. I was formally introduced to him on the 17th day of November, 1902, on the curb in front of the Rialto Building in this city.
Q. Who introduced you to him?
A. I think it was Mr. Earnest H. Kastor.
407 Q. Was Mr. Harlan present there?
A. Mr. Harlan was present.
Q. That was in front of the Rialto Building, you say?
A. Yes sir.
Q. And where did you go from there?
A. We went to the depot and took the train for Chicago.
Q. Who went to Chicago?
A. Mr. Harlan, Earnest H. Kastor and myself; that is of our party.
Q. Did you have any business with Mr. Kastor at that time?
A. Yes sir.
Q. What was that business?
A. If you will allow me to explain a little?
Q. Yes.
A. I had made my arrangements to go to Washington, leaving Kansas on the 16th, by Kansas City and Chicago, and my wife did go that way. After making the arrangements, I got either a letter or a telegram, one, from Mr. Kastor, about a subject matter that we had been considering for some time—that is, he had communicated with me about it.
Q. What had that reference to?
A. It was to try to secure the agency for the Kansas City, Mexico & Orient Railroad Company, that was in course of construction at that time, and is yet being built.
Q. What kind of an agency?
A. Advertising agency. That is, to advertise—The road is being built by two construction companies—to advertise the
408 stock of the construction companies, and to advertise the securities, that is, the bonds, later, when they should be ready.
Q. Were you interested in that road?
A. I was a director of both the construction companies and the railroad company, and a friend of Mr. Stillwell, who is at the head of the enterprise.
Q. That was the occasion of your meeting Mr. Kastor here?
A. Yes sir. And I am also intimately acquainted with some of the other officers of the company. I was also a director at that time,

I think—I know I was a stock-holder of the financial company that had to do with it.

Q. Had you prior to that time had any acquaintance with Dennis?

A. No sir, that is the first time I ever saw Dennis.

Q. Or any knowledge of the Rialto Grain & Securities Company?

A. I never heard of it until that day.

Q. And while down here with Mr. Kastor it was that you were introduced.

A. Yes sir. I could state in a few brief words.

I think I arrived on a belated train. At any rate, I met some Kansas friends at the Southern, and after talking awhile, I went down to Mr. Kastor's office and talked with him; and suddenly saw it was getting late, as I had arranged to take the noon train to meet my wife, and he said he was not through. And he either said, "I have
409 a client for you," or "There is another party wants to see you," or something. And I said, "I haven't time." And he then talked over the 'phone a moment. Then he said, "I will go with you." I said, "Well, come and go with me." And we got into a carriage and drove to the depot.

Q. Had you completed your business with Mr. Kastor at that time?

A. No sir. He had rather an elaborate plan, and decided to go on with us.

Q. After you got down to the station, you say you took the train for Chicago, you three?

A. Yes sir. We missed, I think, the first train, but in a few minutes took the Alton, as I remember.

Q. What occurred on that train between you and Mr. Harlan. Please state.

A. The first thing we did was to go into the dining car; which I think, as I remember, was a composite car; and take lunch; and, generally, get acquainted. We were some time at the table at lunch, and then the table was cleared off, and I think we had our cigars there. I think there was nobody else in the dining car.

Q. The train leaving Union Station pulls right out of the state, I believe, across the river?

A. Yes sir.

Q. Had you begun your conversation about any matter of business before that?

A. No sir. I should think we had been an hour and a half on the train before anything was said about business.

410 Q. And were over in the state of Illinois?

A. Yes sir. It might have been longer than that. But it was quite a time.

Q. State what conversation occurred between you and Mr. Harlan. Begin at the beginning of the conversation, respecting business, and state what it was.

A. As I remember it, Mr. Harlan said that he wanted to talk with me about the subject matter of his trip. He said he was connected with Mr. Hugh C. Dennis, as one of his attorneys, and that Mr. Dennis wanted to employ me. He said he wanted to first tell

me who Mr. Dennis was. That he was a district representative of a Hartford Insurance Company, and I think he named the company but I have forgotten it. That his territory embraced several states. That he had made a great success, and was a man of wealth, and of high character. I think he said he was admitted to be worth a quarter of a million dollars, with more than one hundred thousand dollars in cash in the bank, and was about to have trouble, and would probably be indicted, because of his relation with what he called the Brooks Brokerage Company. He said he wanted to tell me about that. And he did go into some detail. He said the company had been organized the summer before by a man by the name of Brooks, and that some time in the late summer, if I remember it, Mr. Dennis had bought the stock of the company, or bought the company out, and Brooks had gone to California. That he had returned, and was making trouble for Dennis. It seems that he wanted to buy back into the company, if I understood it, and Dennis did not
411 want him, or they could not agree. And he instituted a collection agency and began to harass with law-suits, civil, and it had resulted in a great deal of trouble between them. And it developed—well I am a little ahead there. He told me that Dennis did not know anything very much about the business when he bought it out from Brooks, and the details of it were left with a man, whom he named, Walden, or Walton, or some such name as that, who had been secretary under Brooks, and who remained in the management as to details, and that this row between Brooks and Dennis had developed the fact, or brought home to Dennis the knowledge that there had been some irregularities. That as soon as Dennis discovered that he immediately closed the company, paid all its obligations, and organized his own company.

He apprehended, however, that Dennis would be indicted, and was also anxious upon that subject or about that matter.

After talking quite a time, why the subject, as I remember it, of fees was broached. I don't know just how we got at it, but in some way Mr. Harlan said, "Instead of being the attorney alone in that case, how would you—why not be the counsel for the company, so that we can be at liberty to call on you, not alone in this case: this is an important thing that is pending, but we might want to ask your advice about other matters." I then said, "Well, tell me about your company. Has it any trouble with the Department?" I think he had spoken about this row between he and Brooks as causing an investigation of the Brooks Brokerage Company. He said,
412 "No, it had no trouble whatever. And that in the nature of things it could not have. That the company was organized under the direction of himself and Judge Chester H. Krum. That it was not violating any state or federal law, and did not intend to." I said, "Well, Mr. Harlan, let me understand you. I am a Senator. Is it contemplated that I shall present or try any case before the Department, or try to influence the Department in any way." He said, "Not at all. We wont expect anything of that kind." I said, "Under no circumstances will I try a case in the Department," and I said, "What is more, Mr. Harlan, if you have any trouble with

the Department, if I should be your counsel at any time, why I would resign. I cannot afford it." Of course I made it clear, any trouble about any executive matter, I did not speak, of course, about the courts. I mean, I did not mean the courts.

Before any terms were agreed upon, there was a very elaborate discussion of the business and the purposes of the Rialto Grain & Securities Company, that is, I mean the kind of business it contemplated. And that fit into the plan that Mr. Kastor had for the sale of securities, or the contemplated securities—I mean the bonds—that the Orient Road was expected to put up.

I wont pretend now, in any of this conversation, to give the words. I am giving my memory of what was said, as it was left with me.

He called my attention to the fact that in the great West and middle West, and in fact all the country this side of the
413 Alleghanies, there was no concerted effort to reach the small investor with high grade securities, and that one of the greatest trouble was the fact that such securities were in too large denominations. Now I suppose we talked a couple of hours on that subject. But I have given you the substance of it, as I remember it.

The question, then, of terms of employment——

Q. Before you pass to that, Senator, was there anything said about your rendering service or assistance in connection with the securities feature, to the company?

A. Oh yes. They said they were about ready to enter upon that work; and, hence, he was very apprehensive that an indictment against Major Dennis, who was known to be the owner of the Rialto Grain & Securities Company, would materially retard them; that is, it would bother them. And he said, "During the time you represent the company, you can be of service to us with putting us in touch with trust companies, and assist us in finding the kind of securities that we want to handle." But I did not understand that that could be taken up until this threatened cloud was out of the way.

When we came to the subject of fees, he asked me what I considered right as a salary per month. I don't know just how I got at it, but I think I mentioned $500 a month; and after some dickering backwards and forwards, or waiting, I don't remember which, he seemed to be satisfied. I said, "Now, Mr. Harlan, of course I don't want the responsibility of a case, or helping in a case of this kind—" I am trying to remember just the words there that I used.

414 Q. Give the substance of it?

A. At any rate, "I didn't want to be retained in a case of that kind, for a man who was rich, for $500. The case might pass off within a month. He said, "Oh, that is not contemplated at all, Senator. You can help us in this other matter that we intend to come up; and as to that matter, time can be mentioned." Whether he mentioned it or I did, it was to be $500 a month for not less than five months. And he made the remark, "It will not terminate then unless you terminate it." No- so far as I remember, that was the substance of what was said.

When I parted with him that night he said he had no authority to contract, but he would recommend that I be employed. And if it

was decided to employ me that he would come on to Washington for a full conference.

There was one other subject discussed on that occasion, and in what connection I do not know, and that was whether there was any way to avoid the indictment against Dennis, or the threatened indictment against Dennis, and if not, what was the best way to reach it in taking care of it.

Q. You parted, then, in Chicago?

A. Yes sir, about nine o'clock in the evening, as I remember, we arrived there.

Q. And where did you go?

A. I went to Washington the next morning. I left for Washington the next morning.

Q. And so far as you know he returned to St. Louis?

A. Yes sir?

415 Q. Now after you got to Washington did you receive from him the letter which has been introduced here?

A. This letter of November 18th I received on the morning of the 20th, the day after I arrived in Washington.

Q. Upon receiving that letter, what did you do?

A. I went down to the Postoffice Department. When I received the letter I noticed that he had spoken about that the company wanted my services. That he had mentioned the amount of the salary but that he had not mentioned the other matter, as to the length of time it should run. But I thought he was acting in good faith, and did not doubt it, and the expression in the letter, together with what he had said to me, caused me to assent to it.

You ask me what I did then?

Q. Yes.

A. I went down and saw Mr. Cochran. It will be remembered that I was asked about—to find out if I could the purposes of the Government, so far as the Postoffice Department was concerned, as to whether they intended to prosecute Dennis. I went down and saw Mr. Cochran, and he told me he didn't know anything about it. My memory is that he said that the matter, so far as the Department was concerned, was in the hands of Mr. Dice out here. I then asked him what he knew about the other company, the Rialto Grain & Securities Company. I think he said, "I don't know anything about it." I said "Are there any complaints here against that company?" He said he didn't know but would look. He got up and went to a record, and came back and told me that there were two complaint- that had been

416 filed against that company in the latter part of October or the fore part of November, and that they had been sent out, I think he said, on the 7th. I fixed that by a little memorandum that I had pinned to the letter I had with me. I had Mr. Harlan's letter with me. Independently, I would not remember the date, perhaps.

I said, "Mr. Cochran, my understanding is that the trouble as to Major Dennis grew out of his connection with the Brooks Company; that has suspended; and that I have been led to believe by the local attorney of the company that this company is all right, but I don't

know. They are strange to me. And if there are any complaints filed here against the company, or anything that puts you upon inquiry, I wish you would let me know, unless there is some reason why you should not.

I asked him then about the custom, and he said that was always the custom, to grant a hearing to parties against whom complaints were filed, unless it was a very aggravated case. I said, "If anything comes to you that requires summary action, of course I don't ask to be advised." I said to him that whereas I was attorney of the company, I was not its attorney there, and under no circumstances could I be employed as the attorney in the Department. I think that was about all of the conversation.

Q. When did you next see Mr. Cochran?

A. Well, I could not fix the date except from the letter. I see I wrote a letter on December 9th, or a letter was written by either myself or my secretary on that occasion. I suppose that was the date.

417 Q. December 9th is the date. Now what took place at that time.

A. I had received that letter from Mr. Harlan, of date I think December 3rd, telling me of two men that he regarded as imposters.

Q. Bowman and S——?

A. Yes sir.

Q. Just state what occurred there between you and Mr. Cochran with respect to that?

A. I took the letter, as I recollect, and showed it to Mr. Cochran, and he spoke at once and said there were no such inspectors, and that they had violated the law in representing themselves as such, and he would like to catch them. He said, "There is nothing in this. There have no instructions gone out from here at all"—or something of that kind. And that was all the conversation that I remember.

Q. Now, the next time you saw him was, I believe, December 15, 1902, as the date is fixed?

A. Yes sir. In the mean time, Major Dennis had been indicted, and he came on to Washington, bringing on with him a copy of the indictment, and a statement of what purported to be the facts, prepared by his counsel here, Judge Krum and Mr. Harlan. So far as I know, he had no other business there.

Q. By the way, there is one thing I omitted:

Did Mr. Harlan come down to Washington prior to this time, and about the latter part of November or the first of December?

A. Yes sir. I only judge from the letters as to the time, as to the exact date of his arrival. He left here, I take it, the 24th, and

418 arrived there the night of the 25th, perhaps. I should say the 26th is when I saw him there.

Q. That was in November?

A. Yes sir. That was carrying out the statement that he had made to me at the time I was employed, that if it was decided they wanted my services, he would come on to Washington for a full conference.

Q. What was the subject matter of your meeting? I don't ask you to go into the details about that.

A. The subject matter was the impending indictment against Major Dennis, and what to do, if anything, to prevent it; and if anything could be done to prevent it, how—what—how soon to get a trial, or what to do about it.

Q. In other words the conference was between you as counsel, with respect to the apprehended Dennis case?

A. Yes sir. I want to say in that connection—I see by the date of the letter that he wrote me on the 22nd, that he would leave on Monday, the 24th. I saw him on the 26th. From that letter he told me that these two complaints I had written about had been examined by the government officers, who found nothing in them.

Q. While Mr. Harlan was down there at Washington, did either of you go about the Department.

A. No sir. Nor did he mention, nor did I think of these two complaints. When I received his letter the matter of those two complaints passed out of my mind, and I never heard of them again until after I was indicted.

419 Q. Was anything said at that time about any matter pending in the Postal Department between you and Mr. Harlan?

A. Pending, so far as the Rialto Grain & Securities Company was concerned?

Q. Yes, pending so far as the Rialto Grain & Securities Company was concerned, I should have added.

A. No sir. Our anxiety—or his anxiety—was, and our talk was, what to do with the criminal case, in the event it was brought.

Q. Coming again to the visit of Major Dennis. I believe you said he came down there to Washington?

A. Yes sir.

Q. State what occurred?

A. I spent an evening with him examining the indictment, and the statement of facts, and that was all that evening, as I remember. The next morning I gave him my opinion about them.

Q. What further transpired?

A. When I was ready to leave the hotel—he was stopping at the Willard—he called a carriage and we got in, and drove out the Avenue to my office in the Maltby Building; I should say a distance of three quarters of a mile. And as he was going away, he said he wanted to make a draft, that he wanted some money; and as he wanted more than I had I said, "I will have to go to the bank with you." So we got back into the carriage and retraced our steps going up the Avenue, and as we approached the Postoffice Building, he made some inquiry as to what building it was, and I told him

420 it was the Postoffice building. And I don't know, but my recollection is that I suggested that we get out and call upon the Fourth Assistant Postmaster General, Mr. Bristow. He was from my state. I think something was said that he had not seen the building, or something of that sort. We got out, and went into the building, went in the elevator to the fifth floor, and went into the office; but Mr. Bristow was not in. We waited a moment or two, and then

we came out. And passing the stairway —there is an unique iron stair-way right in the corner—he made some remark about it and was looking at it. I said, "Major, we can step down this stairway and take the elevator on the next floor." We walked down to the next floor, and passed Mr. Cochran's room. He was sitting at his desk facing the door. I said, "Let us step in, Major, and I will introduce you to Mr. Cochran." We stepped in, and I introduced them. I said, I think, "Mr. Cochran, here is the man you indicted in St. Louis, and I want you to see what a pleasant looking man it is you have indicted." They then began to talk about family names, or something, and Mr. Dennis said his middle name was Cochran, Hugh Cochran Dennis. They talked a moment about where they were from and so on, and then we got up and left.

Q. When did you next see Mr. Cochran?

A. I can only fix the date by the letters, as he does, and that was on the 24th of January, I think.

Q. What was the occasion of your calling there? What was the subject matter?

A. I had received either a letter or a telegram—I have forgotten now which; and I don't know whether they are in or not.

421 At any rate, I had received word from Mr. Harlan that the books of the Brooks Brokerage Company that Major Dennis had turned over—voluntarily turned over—to the government or to Mr. Dice, to be used in the trial against him, were about to be turned over by him to the state authorities. I went down there and talked with Mr. Cochran about it and I told him I did not know anything about it except the word I got. That if the government wanted to keep the books I had no objection, and certainly would not make any. But if they were through with the books they ought in good faith turn them back to Major Dennis and not turn them over to the state authorities. He seemed to be in doubt about what to do about it, and my recollection is we went up to Mr. Bristow's room, and Mr. Bristow seemed to be in doubt, and they two left and went to the Postmaster General. I don't think I went with them. At any rate, both of them said to me that the matter would be inquired about.

Q. That was the only thing, that was the sole and entire subject matter of your visit there?

A. Yes sir.

Q. When did you next see Mr. Cochran?

A. I fix the date again in the same way. It was February 5th. I got a telegram from Mr. Harlan that Mr. Dice had turned over the books and papers to the state authorities; and I had asked my secretary (I think I got it during sessions of the Senate) and I think

422 I asked my secretary to ask him to come in the evening, or the late afternoon, just before dinner. He came there and I showed him the telegram, and he expressed surprise at that part of the telegram which said, "Colonel Dyer says I have no further use for the books." I said, "Mr. Cochran, you have all the information I have about this, and I think if the government is through with these books they ought to turn them back to Major Dennis." He said, "I think so too." That was all there was on that subject.

Then Mr. Cochran, who was formerly from my state, and who I knew knew me perhaps better than I did him—we began to visit and talk generally. And I think something was said of a personal nature, about my having lost my fortune in the panic and the long hard years that followed, and that I was trying to supplement my salary, which was very small compared with the demands made upon a Senator, by the practice of my profession. And that this case had been tendered me, and I was very glad to get it. And then I said, "Now, again, Mr. Cochran, I am the attorney of a company—" I don't know that I distinguished or named the company—"that has got to do with the mails." I thought he would understand it. "And I am anxious that there shall be nothing on my part that would be in the least bit questionable. I cannot afford to remain the attorney of the company if it is in trouble with the Department at all." I don't remember the words, but that was substantially it.

Q. What did you say, if anything, with respect to having practiced in the departments, or other senators having practiced in the departments?

A. I think that arose in this way: I had been in doubt—I
423 knew the old custom in the Senate was that Senators who were lawyers continued their practice in the courts and as counsel. Men like Conkling and Edmunds and other lawyers. When I went to the Senate I didn't know but that some custom had grown up to change that. Of course, I knew they had a right to do it. I think I spoke of that, I had inquired and found there was nothing—no custom against it, and that it was all right. I know I mentioned Edmunds and Conkling's names. But I did not say anything about them practicing before the departments.

Q. What about yourself practicing before the Department?

A. Oh no, it wasn't there—it was practicing my profession.

Q. What was the case that had been referred to by you?

A. The only case was the case against Major Dennis. I notice Mr. Cochran speaks about that case made on the two complaints. He might have done that without my comprehending what he meant. I never knew they called it a case. I supposed every complaint stood on its own foundation, and I never heard of a jacket, or complaint, until Colonel Dyer was making his opening statement in the last trial.

Q. Now that jacket which was introduced here had other names besides those of Bella Evans and Mrs. Houts upon it, a number of others; I recall Fravel and Allen. Did you ever hear of those?

A. I did not. During the entire time I was Senator I never heard of any complaint against the Rialto Grain & Securities Company of any kind or character except those two mentioned to me by Mr. Cochran.

424 Q. Mr. Cochran spoke about an interview, I think it was in January of 1904 after the indictment had been returned against you, and with respect to that?

A. Yes sir.

Q. Directing your attention to that, I will ask you to say what occurred there?

A. In the dispatches that were brought to me by an Associated Press man, Mr. Cochran's name was mentioned as having been in St. Louis and testifying before the Grand Jury, I think. I don't know about that; but, at any rate, he had been here about that time. I asked my secretary, Col. Smith, to ask him if he would not come to the office. He did come, and brought with him Mr. Vickery. I asked him if he could tell me what this case was about; He said that he had testified before the Grand Jury, and that he was not at liberty to tell what he had testified to. I told him I did not ask him to tell me what he had testified to before the Grand Jury, but to tell me, if he could, what was the nature of the charge against me. He said he thought—I think he also remarked that he would probably be a witness, and hesitated to say anything. He said that it was founded, as he understood it, on Section 1782; and I asked him further about it, and he said it was a charge for practicing before the Department. I said, "Well, Mr. Cochran, I haven't practiced before the Department. What cause have I tried before the Department? What have I done before the Department?" I think those were my questions, or something of that kind. And he didn't seem to want to talk, and I said, "I haven't any hesitancy in giving my
425 memory of it." I said, "I told you I was the attorney of the company, but I was not its attorney there. That under no circumstances could I be employed to try a case in the Department." I said, "I have gone before the Department the same as I have gone to the Pension Department, and other departments, and if I cannot do that without being treated in this way, I will quit." I said, "I have tried always to be in harmony with the departments, and not be in opposition to them." And when I got through talking, in a few moments, he said to me, "Senator, I will make one statement notwithstanding I do not want to talk. You did say that you could not be employed under any circumstances as an attorney in the Department."

Q. Now, Mr. Burton, in these visits that you made to Mr. Cochran the five visits prior to this one in January, 1904, had you or hadn't you, any intent or purpose to affect the official action of Mr. Cochran, or any one else, with respect to any complaints of any kind against the Rialto Grain & Securities Company?

A. I did not. And I don't think any government official will say so.

The COURT: I prefer that the latter clause should be stricken out. The witness should confine himself to answering questions. The other witnesses will testify for themselves.

Mr. LEHMANN:

Q. Recurring to the case against Dennis, I believe the indictment was found in the latter part of November, 1902: you have testified with respect to a conference with Mr. Harlan in Washington concerning that, and also with Mr. Dennis in Washing-
426 ton: had you any conference with them, or either of them, or any one else, with respect to that case, any where else, after November 20, 1902, and prior to March 26, 1903?

A. Yes sir. I came on to St. Louis for a conference, after the adjournment of Congress, and arrived here on Christmas Eve, and Judge Krum, Mr. Harlan and myself, spent the better part of the night in going over the facts of that case and the law. And then I left the next day for Kansas, and returned here and had another conference with Mr. Harlan, on either the 6th or 7th, I have forgotten which, of January, 1903.

Q. Do you recall when the case was originally set to be tried?

A. My memory is, it was the 6th of January. I think, however, it had gone over a couple of days before I came here. I won't be positive about that. I know I expected to help try the case when I left here. I communicated with Mr. Harlan while I was in Kansas—you have the telegram there—and when I came back here I found the case had gone over until the middle of the month or a little later.

Q. And you returned to Washington without participating in the actual trial of the case in the court?

A. Yes sir.

Q. Was the matter of your appearing, or the necessity for your appearing, considered between youself and Mr. Harlan and Judge Krum?

A. I don't remember that there was ever anything said between myself and Judge Krum. My memory is that that conver-
427 sation was between myself and Mr. Harlan, both before I left here for Kansas and on my return. But I may be mistaken. Judge Krum may have been present.

Q. The conclusion was reached that your presence would not be necessary, was it?

A. Well, I decided that question for myself, Mr. Lehmann. I felt so sure that the case would be taken from the jury that I felt my client's interests were safe without me, any way. That was the reason that controlled me. I felt it was not necessary.

Q. I call your attention, Mr. Burton, to the testimony of Charles H. Brooks, upon yesterday, to the effect that in the early part of January, 1903, in his office in this city, there being present himself, Mr. Richard Kastor, and yourself, that Mr. Kastor made statements with reference to Mr. Brooks' employing you, and about what you had done for the Rialto Company, that you had been the man who had blocked Brooks' purpose against Dennis—or something of that sort. You recall the testimony?

A. Yes sir, I heard it.

Q. I will ask you whether any statements of that kind were made in your presence by Mr. Kastor or any one else?

A. None whatever.

Q. You were here in this city, I believe, in March of 1903?

A. Yes sir.

Q. You called at the office of the Rialto Grain & Securities Company?

A. I did.

428 Q. State what occurred there?

A. I went in, just before noon, as I remember, and asked

Mr. Mahaney, for my last month's pay—or I had decided to make it the last month's pay. And he asked me to come in after dinner. I did not sit down at all at that time—I mean, he asked me to come back after the noon lunch.

I went back in the afternoon, and he handed me the money. You want everything that I remember?

Q. Yes.

A. I think I inquired about the condition of Major Dennis.

I then said to Mr. Mahaney, "I want this to terminate the contract;" and he said that he supposed that if Major Dennis was there that he would want me to remain. And I said, "Well, he is not here, and that matter can come up leter"—or something of that kind. Now, anything else, I do not recall.

I recall the condition of mind I was in when I went there.

Q. Never mind about that.

I will ask you whether you made any request for any letters or telegrams from him, to be destroyed?

A. There was not a word said about letters at all, in that office, that day.

429 Cross-examination.

By Mr. DYER:

Q. There were no letters destroyed in your presence at that time, by Mahaney?

A. No, sir.

Q. Was there anything said at that time by you, that before leaving Washington you had visited the Department and found that there was no claim or complaint against the Rialto Grain & Securities Company?

A. Not a word said about that, Colonel, that I recall.

Q. Did you leave him there, upon that occasion, your address in Kansas?

A. No, sir, I did not give him my address.

Q. Did you say to him in the presence of Mr. McRae——

A. Colonel if you will allow me to explain: I have no memory of leaving any address and I don't think I did.

Q. Was there anything said in that conversation, in the presence of Mahaney and McRae, that at any time thereafter that the Company needed your services you would be glad to give them?

A. No, sir, I know there was nothing said of that kind.

Q. Your attention was called to the testimony of Brooks: Were you at the office of Brooks, or the National Securities Company on or about the time he stated yesterday that you were?

A. Yes, sir.

Q. Were you there in company with Kastor?

A. Yes, sir.

430 Q. I will get you to state whether or not in that conversation it was said by Kastor that you had been the means of preventing his action being effective against Dennis or the Rialto Grain & Securities Company, in the Post office Department?

A. No, sir.

Q. Did he, Brooks, say to you at any time that he thought that your services with the Company might be desirable?

A. No, sir.

Q. Was there anything in that conversation said about you becoming attorney for the National Securities Company?

A. No, sir.

Q. Was there any agreement made there in that conversation that you should become connected with that Company, as its attorney?

A. No, sir.

Mr. LEHMANN: That question is objected to as immaterial.

Mr. DYER: I am asking him about the whole of the conversation that occurred there that day, and I am asking for the full conversation.

The COURT: Do you want the answer stricken out, Mr. Lehmann?

Mr. LEHMANN: Yes.

The COURT: The answer will be stricken out. As to whether the defendant was on that occasion employed to represent the National Securities Company is not a matter at issue in this case, and is not a matter of cross examination.

Mr. DYER:

Q. When — you last see Kastor?

A. Which Kastor?

Q. Richard H. Kastor?

431 A. You mean the date, Colonel?

Q. Yes, when did you last meet him?

A. It was some time last week, I think. Let me see—this is Friday; well, I think it was last Saturday, really.

Q. Have you seen him since yesterday?

A. No sir.

Q. I will get you to state whether in this conversation had at the time you were in Brooks' office, that it was said that he would require your services?

Mr. LEHMANN: That is within the ruling, I submit.

Mr. DYER: I submit not. I am asking about that whole conversation.

The COURT: That is not a matter that we can go into here. The only part of that conversation as detailed by the witness Brooks that is material here, is that part wherein Mr. Kastor was stated by Brooks to have said in the presence of this defendant, as an inducement to the employment by the National Securities Company of the defendant, that the defendant had obstructed Brooks in his fight against Dennis and the Rialto Grain & Securities Company, and had prevented the issuance of a fraud order against the Rialto Grain & Securities Company, and had thereby shown what services he could render to the Brooks Company. That was admitted here, when it was given not with a view, of establishing whether or not the defendant was employed by the National Securities Company, but only with the view of its reflecting light on whether or not he had been em-

ployed and acted for the Rialto Grain & Securities Company in connection with the prevention of the issuance of a fraud order.

432 Mr. DYER:

Q. Had you ever before that, to your knowledge, met Brooks?

A. I never had, to my knowledge.

Q. When, in this conversation you have undertaken to detail between yourself and Mr. Harlan, between here and Chicago, was there anything said in that conversation about the matter of literature that was issued and to be issued by the Rialto Grain & Securities Company?

A. Well, Colonel, I don't remember that distinctly. I remember asking him about optional trading—I never bought an option in my life, and I did not know much about that.

Q. I am not asking you about that.

A. In that connection I was going to say that I think he asked me if I was employed as counsel if my name could go with his and Judge Krum's, on the literature.

But I want to say I never knew my name was on that literature until I saw that booklet after this trial began.

Q. Was there at any time sent to you any of this so-called literature at Washington?

A. No, sir, I think not. I don't remember to have seen any.

Q. When you went down to see Mr. Cochran, on the 20th day of November, 1902, you had in your mind, you say, the matter of Dennis' threatened indictment for his connection with the Brooks Brokerage Company: Is that true?

A. Yes, sir.

Q. How did it become important, if it did so become, for you to ask at that time if there were any complaints against the

433 Rialto Grain & Securities Company?

A. Well, I had been employed by the Company, and Mr. Dennis was a stranger to me and so was Mr. Harlan. And Mr. Dennis was threatened with trouble because of his connection with the Brooks Company, and I wanted to know that the assurances that Harlan had given to me were true.

Q. Then at that time you were informed that complaints had been made against the Rialto Grain & Securities Company, and that those complaints had been by Mr. Cochran forwarded to George A. Dice, Postoffice Inspector in Chargee in St. Louis, for examination and report, were you not?

A. I was informed as to these two complaints that they had been sent out here for examination.

Q. And then, being so informed, what gave rise to your saying, in substance, in your letter to Harlan "All such complaints must be taken care of, especially until we get rid of the Brooks matter"?

A. Why, the reason—you ask me the reason for that expression in the letter?

Q. Yes.

A. I do not have any independent recollection of dictating the letter, but I take it that the reason was, that the indictment of Dennis

being made public, and Dennis owning the Rialto Grain & Securities Company—in fact, I never disassociated the two; When I thought of the Rialto Grain & Securities Company I thought of Dennis; and when I thought of Dennis I thought of the Rialto Grain & Securities company—would naturally cause more or less excitement, and
434 complaints might be sent in; and my advice to him was to take care of it.

Q. What was your purpose in going to the Post Office Department in Washington after the Dennis matter had been disposed of, to ascertain whether Post office Inspectors had been charged with the duty of examining further the Rialto Grain & Securities Company?

A. I did not go with that view, I don't think, Colonel. My recollection is, that all I did was to inquire if complaints were made—just the same, I will explain, just the same, exactly, as I would inquire for anybody else. I was the attorney of Major Dennis; and as I would inquire for a man—I have inquired, for instance——

Q. Oh, yes, I know you might inquire a thousand things. But you answer my question.

Why did you go there at that particular time, and what induced you to go there at that particular time, to make inquiry as to whether an investigation was going on against the Rialto Grain & Securities Company?

Mr. LEHMANN: Counsel has not specified any particular time.

A. If you will specify the particular time.

Mr. DYER:

Q. I will get the dispatch and fix the time.
A. I know the dispatch to which you refer.

Mr. DYER:

Q. I will fix the time by the dispatch.
A. You mean the one of the 25th of February, don't you?

Mr. DYER: I don't recollect. Counsel wants me to fix the time, and I want my question to be definite.

Q. The time I fix is of February 27, 1903. The dispatch
435 which has been read in evidence to the jury, is of the 25th of February, 1903.

Counsel here reads dispatch, which is in the words and figures following, to-wit:

Hon. J. R. Burton, Washington, D. C.:

Report to me today from apparently reliable*m* source that two special inspectors have been appointed to investigate us and report to Postmaster General. Please verify and advise at once.

W. D. MAHANEY."

Q. Do you remember receiving that dispatch?
A. Yes sir.

Q. And do you remember answering that dispatch on the 27th of February, 1903

W. D. Mahaney, Rialto Bldg., St. Louis, Mo.:

No complaint in the Department against you. Will write full particulars by tonight's mail."

Do you recollect sending that message to him?

A. Yes sir.

Q. In answer to this (indicating telegram first read)?

A. Yes sir.

Q. Then did you write to him that night, as you indicated you would?

A. I only know that from the telegram. I suppose I did.

Q. Did you retain copies of your correspondence?

A. No, sir. I will explain that at that time we did not retain very many copies of our correspondence.

436 Q. Then whatever letter you wrote, if you wrote one at all, you*n* have not now a copy of that letter in your possession?

A. No, sir.

Q. Now I will get you to state further, whether or not you ever rendered any services in reference to the Securities feature that was mentioned in the conversation between you and Harlan on the 17th day of November, 1902?

A. Practically none. I mean, very little.

Q. Have you——

Mr. LEHMANN: Let him finish his answer.

A. Wait until I explain. My understanding was, that if the indictment was brought that that matter would have to await the determination of the indictment; and that was the latter part of January as I remember it; and very soon Major Dennis had a complete collapse, and there was nothing done about it, except that I did this: I took up the matter with Senator W. A. Clark, whom I regarded as an authority on all kinds of securities, and discussed it with him quite fully. And I made two trips, I think it was, to New York, and took up the matter and discussed it with a member of the firm of Kissler & Company, who formerly lived in the West, with Mr. Gillette and also his attorney Mr. Blackmer; they have since removed to New York. But that was preparatory work only, and very soon after I quit the Company, and did nothing more about it.

Q. In this conversation between here and Chicago that you have referred to as having occurred between yourself and Mr. Har-

437 lan, I will get you to state whether it was not said to you at that time, there will probably be no indictment against Major Dennis, but that if any indictment at all is found by the Grand Jury at St. Louis it will be against Brooks; that Major Dennis has had nothing to do with the Brooks concern that would involve him in that controversy?

A. Well, a part of that was said, Colonel. That is to say, Mr. Harlan assured me that Brooks had done nothing wrong—I mean, that Dennis had done nothing wrong in his connection with the Brooks

Company, but that he was very apprehensive that he would be indicted, nevertheless.

Q. Now you have spoken of visits to Washington by Dennis: Did you communicate with Dennis prior to his coming to Washington as to the time when you could see him?

A. Well, I don't know, from memory. I was advised he was coming, both by letter and wire, I think.

Q. Look at this message and say whether you sent that message to him on the date mentioned in that message; and if so whether that had reference to his proposed visit to Washington?

Mr. LEHMANN: Perhaps that ought to be identified.

The COURT: This is a preliminary question.

A. I have forgotten the date there, Colonel.

Mr. DYER:

Q. Look at the date and see when it was received?

A. I never date my messages myself.

Q. Did that have reference to his proposed visit to Washington?

438 A. Well, if I could fix the date I should say that it had, and I should also give it as my best impression and recollection, from the subject matter of the message, that it had.

Mr. DYER: I will offer this message in evidence. It reads as follows:

Major Huch C. Dennis, St. Louis, Missouri.

Your second message received. In answer, yes, it will be entirely convenient for me to see you Monday.

J. R. BURTON.

Q. Was it arranged that you saw Dennis at Washington?

A. I cannot remember the date, the day of the week, Colonel. It was on the 14th and I will tell you the reason why I know, if you want me to. On the 15th was the day that he made the second payment to me, and at his suggestion, stating it would be more convenient to keep the accounts if my salary should date from the 15th, from that time on.

Q. Then you say this draft what was written at Washington drawn on the Commonwealth Trust Company, or whatever Trust Company it was here, I think it was the Commonwealth, by Dennis, was a draft drawn—your second payment was a draft drawn in Washington and deposited in the Riggs National Bank?

A. Yes, deposited in the Riggs National Bank. I deposited it like any other draft coming to me, to my account.

Q. Just like you did the other drafts?

A. Yes, just like I did the other drafts.

439 Q. When you went to the Postoffice Department to see Mr. Cochran on the first occasion of your visit, to-wit on the 20th day of November, 1902, did you say to Mr. Cochran that the Rialto Grain & Securities Company was all right?

A. I don't know that I said it just in that way. I told him, I think, this: My information is that the trouble between Dennis and

the Government grew out of his relation with the Brooks Brokerage Company, and that I had been advised by the local counsel who had employed me, that the other Company was all right; and I also explained to him however, that I was a stranger, and that I did not know them.

Q. Did you tell Mr. Cochran in that conversation at all that you had been employed by Harlan or by the local attorney?

A. I told him first that if he intended to indict Dennis I expected to help defend him. And I told him that I was the attorney of the Company, but not the attorney here; as I said awhile ago, I never disassociated Dennis and the Company, so far as that, as Dennis owned the Company.

Q. I am not asking you what you disassociated. I am asking you whether at that time you said to Mr. Cochran "The Rialto Grain & Securities Company is all right."

A. I may have used that language, Colonel, in the connection in which I told you.

Q. Did you say to him at all that you had been employed by the local counsel?

A. I don't know that I said by local counsel. I think I said to him that I was assured by the local counsel, who employed me. I said to him these parties are strangers to me, and I don't know.

Q. I will ask you a question: You speak of your visits to the Post Office Department and various ones to Mr. Cochran: Were
440 you at the Post Office Department on Monday the 1st day of December, 1902, the day that Congress met?

A. I cannot tell you that, Colonel. I want to explain that answer, now. A new Senator from the West is called upon to go to the Department so often, that I could not remember whether I was there on that occasion or not.

Q. Did you go to the Department, and to the office of the Assistant Attorney General, before nine o'clock on the morning of the 1st of December, 1902?

A. I don't know, sir; I have no recollection of it at all.

Q. Do you remember of going there and asking for General Tyner, that particular morning, and waiting some half hour for his arrival?

A. No, sir, I do not. General Tyner was almost a stranger to me, and I don't remember of ever meeting him in the office, and I may have done so several times.

Q. Now I will ask you whether or not you received a message with reference to the Rialto Grain & Securities Company from Mr. Harlan, dated Saturday night the 29th of November of that year, and did you, if you did so receive such a message, go to the Department that morning in connection with that dispatch?

A. I only know from the dispatch that I sent as an answer. I have a dim recollection that I received a dispatch from Mr. Harlan, but not from the Rialto Grain & Securities Company. But I did not go to the Department as a result of that. It had nothing to do with it.

441 Q. Then, if you went to the Department at all that morning, you have no recollection now as to what induced you to go there at so early an hour in the morning, if you went there at all?

A. Oh! that wasn't an early hour.
Q. I say you went there before nine o'clock.
A. If you will say how long before nine o'clock.
Q. Five or ten minutes before nine.
A. Of course, that would be considered not late at all. But we get to the departments sometimes pretty early. It had nothing to do—I have no recollection whatever about going.
Q. The hour of Congress meeting that day was twelve o'clock, wasn't it?
A. It always meets at twelve o'clock unless by special motion another hour is fixed. That is the regular hour.
Q. It met at noon on the first day of December, 1902.
A. At the opening session it must meet at noon, yes sir.
Q. If there was any matter of importance that would require you to wait for thirty minutes at the office, would that so impress you as to be able to state what that business was which was in hand that morning?
A. Colonel, if there was anything that would call it to my mind. I never heard of that until these young men testified here this time. They were not witnesses in the former case, and this is the first I have heard of it, and it occurred, they say, three years ago, and I don't remember anything about it.
Q. Did you preserve your correspondence. If you received
442 a dispatch of that date from Mr. Harlan, have you got such a message?
A. No sir, I have no such message. But I say I think I got a message from Mr. Harlan.
Q. Now, did you preserve anything of your correspondence with clients or persons who are interested in cases?
A. Sometimes I preserved part of it. Since then I have preserved everything. But I was receiving over one hundred letters a day at that time. I had been in the Sandwich Islands all summer, had just come back, and went into the campaign, and then went on to Washington, and so my correspondence was piled up on me, and I did not preserve one letter in ten.
Q. Did you answer that dispatch of the 29th of November?
A. It is the answer that makes me remember that I received the dispatch from Mr. Harlan. If it were not for the answer I would not have any memory about the other.
Q. Have you a copy of any answer by wire that you sent to Mr. Harlan in answer to that dispatch of the 29th of the month?
A. No sir. That answer is there among the letters.
Q. Is there any letter to which an answer was made, that you have written, that is here, to that dispatch of Mr. Harlan's of the 29th of November?
A. No sir, I think not. I don't know.
Q. Then when you say you would not know anything about it except for the answer, what do you mean?
A. I mean there is a message I have seen which purports to be an answer, or an answer I got from Mr. Harlan.

443 Q. On the 29th of November?

A. No sir, I think the answer is—well I cannot tell the date unless you let me see it. I may be confused, Colonel, about those messages, as I have not the copies before me.

Q. You received a letter from Mr. Harlan December 2nd, calling attention to the fact that he had wired you on Saturday night. You have not got that message?

A. No. I will tell you, I have been having in my mind one thing, and you another. I had in my mind that message that was sent to me on the 24th and answered by me on the 25th. I am mistaken about having sent any message in answer.

Q. You have no recollection now that you did answer the message of Mr. Harlan that was sent to you on the 29th of the month?

A. No sir.

Q. If you did answer it, you have no copy of it preserved?

A. I have no copy of it, if I answered it; and I have no memory that I did answer it.

Q. You testified here before, didn't you?

A. Yes sir.

Q. I will read you from your testimony given before: in speaking about your interview with Mr. Cochran, I ask you whether this question was asked you, and whether this answer was given by you:

"Question: Right there, Senator, what was your purpose in making that inquiry of Cochran in reference to any complaints concerning the Rialto Grain & Securities Company: state to the jury what your purpose in that respect was?"

"Answer: I had been employed as counsel for the com-
444 pany. That I had this letter from Mr. Harlan (referring to letter of Nov. 18th) telling me that the tentative employment he had made with me had been ratified by the company. I had been advised that Major Dennis had had trouble with the Brooks Brokerage Company. As I say, I went there to ask about that. Both Mr. Kastor and Mr. Harlan had assured me that whatever irregularities there were in that company, it was not the fault of Major Dennis. I knew Judge Krum and Mr. Harlan were the attorneys of this company, but, being advised that far, I wanted to satisfy myself with respect to the standing of this company in the department. That was the motive of the inquiry." Was that question asked you and did you answer it in that a way?

A. That question was asked me, and I answered it in that way, I think.

Q. Was there anything said in your conversation with Mr. Cochran on that occasion, about a criminal prosecution against Dennis?

A. Yes, sir.

Do you want me to answer further?

Mr. LEHMANN: That answers the question. If he wants anything more he will ask it.

Mr. DYER:

Q. In your testimony before, was this question asked you?

"Question: Did you go to his office?

"Answer: We went to his office. He was not in. We waited a few minutes, and then we left his office and went down the winding stairway there. I suggested that we go down that way and make a call at Mr. Cochran's office."

445 "Question: What occurred at Mr. Cochran's office?

"Answer: I think it is about as he told it."

Did you give that answer then?

A. I probably did give it just that way. At least, that is substantially true. The only difference is, that my recollection is that it was not mentioned calling on Mr. Cochran until we were passing the door, but I might have suggested it before we went down the stairway.

Q. That is only one flight down?

A. Yes, sir, only one flight.

Q. Was this question asked you,

"Question: Your recollection of what occurred is substantially what Mr. Cochran indicated?

"Answer: Well, sir, I don't remember anything different, unless it was, unless I said to him something about being Major Dennis' attorney."

Q. Did you so testify?

A. I think I did. Yes sir. At least, I take the record for it. I don't remember the words.

Q. My attention is called to the fact that there is one question I omitted. This is the question I omitted: Was this question asked you, and did you answer it as here?

"Question: You introduced Major Dennis to him?

"Answer: Yes I introduced Dennis and I heard some talk there about Dennis middle name being Cochran, and they talked about family matters."

Q. Did you answer that?

A. Yes sir, I think I did. At least, I think that is true.

446 Q. Did you in the testimony you gave at that time, as you now recollect it, mention in that testimony a criminal prosecution against Major Dennis?

A. I dont' know that I used the word "criminal," but I had this letter here and I inquired whether it was his purpose to prosecute Dennis. I don't remember the words.

Q. I know what you have said here. I want to know whether or not, when you testified before, you testified then to what you have now said, as having reference to the prosecution of Dennis?

A. I think I did, Colonel; I think I said something about it. I don't remember just the words. You can consult the record. I think I said I asked him, and I think he said he didn't know.

Redirect examination.

By Mr. LEHMANN:

Q. Mr. Burton, I call your attention to your former testimony respecting that interview with Mr. Cochran, when Mr. Dennis was

there: you were asked, very generally, "your recollection of what occurred is substantially as Mr. Cochran indicated?" Your answer was, "Well, I don't remember anything different, unless it was, unless I said to him something about being Major Dennis' attorney." You so testified?

A. Yes sir, I think I did.

Mr. LEHMANN: I simply wished to bring in the context of what they inquired about.

Q. Was this question asked you:

"Question: Unless it is materially different, it is not neces-
447 sary?

"Answer: As he gave it, it is substantially correct."

"Question: On that occasion, Senator, did you ever have any other purpose in going to Mr. Cochran's office than merely to present Major Dennis?"

"Answer: No sir, we were driving back from my office to the bank."

Did you so testify?

A. Yes sir, I did.

Mr. LEHMANN: This is all I observe on this subject, although there may be more.

448 W. W. SMITH, a witness of lawful age, being duly produced, sworn and examined on the part of the defendant testified as follows, to wit:—

Direct examination

By Mr. LEHMANN:

Q. State your name?
A. W. W. Smith.
Q. Where do you live?
A. Topeka, Kansas.
Q. How old are you?
A. Sixty-three years old.
Q. Do you know Senator Burton of Kansas.
A. I do.
Q. What relation do you sustain to him?
A. I am his private secretary.
Q. And have been for how long a period?
A. Since March 5, 1901, I think it was.
Q. Do you recall the occasion of an interview which took place, I believe in the Senator's office, in the Maltby Building, in the City of Washington, when Mr. Cochran, Mr. Vickery, the Senator and yourself, were present?
A. I do.
Q. Please state what occurred at that interview.
A. The Senator asked Mr. Cochran in regard to the indictment that they had just learned had been rendered against him in St. Louis. And Mr. Cochran went on and said, that he thought it would

be improper for him to discuss it or talk about it. But the Senator said he wished to say to him, and talk to him about it; he wished to tell him just that he wished Mr. Cochran would tell him
449 how it came about, or why he was indicted, and under what statute he was indicted. And I think Mr. Cochran, as he stated to you, told him that it was under Section 1782 of the Revised Statutes, which provides against the appearance of Senators and Representatives before any of the departments of the government for pay. And the Senator went on and told him his version of it. That he was not aware that he had ever infringed upon that statute, or that he had appeared before any department for pay. And while he conceded that he was the attorney of this company, he emphasized the matter, as he had done before, that it was not for pay, and that he could not be employed by anybody to appear before any department for pay.

Q. When the Senator had finished, what did Mr. Cochran say?

A. When the Senator got through Mr. Cochran said, "Well, Senator, I will make one statement; and that is, that you did tell me that you did not appear before the Department for pay; nor neither could you be employed to appear before the Department for pay, for anybody, by anybody."

CHESTER H. KRUM, a witness of lawful age, being duly produced, sworn and examined, on the part of the defendant, testified as follows, to-wit:

Direct examination.

By Mr. LEHMANN:

450 Q. Your name is Chester H. Krum?

A. Yes sir.

Q. You live in this city and are a member of the bar here?

A. Yes sir.

Q. You were a counsel for Hugh C. Dennis in the matter of the indictment which was presented against him in the District Court of the United States for the Eastern Division of the Eastern District of Missouri, and upon which a trial was held?

A. Yes sir.

Q. And your associates in that matter were Senator Burton and Mr. Harlan?

A. Yes sir.

Q. Did Senator Burton, in fact, participate? Did he actually participate in the trial of the case in court?

A. He did not.

Q. Why?

A. Because I advised, or, if you please, directed that he should not.

Q. On what ground?

A. On the ground that it would appear to be——

The COURT: What difference does it make, on what ground?

Mr. LEHMANN: It has been gone into.

The COURT: What difference does it make what was in the mind of the witness?

The Defendant here rests.

451 *Testimony in Rebuttal for the United States.*

W. J. VICKERY, Recalled, in rebuttal testified as follows:

Direct examination.

By Mr. ROBB:

Q. You have already testified that you were present at the interview that Mr. Smith has testified about, at Mr. Burton's office, at the Maltby Building; now whether the statement was made in that conversation by Mr. Cochran to Mr. Burton, in these words, or substantially these words:

"You did say that you could not under any circumstances be employed to act as attorney before the Department"

Was that statement made?

A. Mr. Cochran did not make that statement, nor anything that was in substance that statement.

W. E. COCHRAN, Recalled, in rebuttal, testified as follows:

Direct examination.

By Mr. ROBB:

Q. Upon the occasion of your visit to Senator Burton that has been mentioned here, at the Maltby Building, on the day of the notice of the indictment, did you make this statement to him, or substantially this statement:

"You did say that you could not under any circumstances be employed to act as attorney before the Department."

A. I did not.

452 Cross-examination.

By Mr. LEHMANN:

Q. You heard Mr. Smith's testimony on the former trial of this same matter?

A. Yes sir.

Q. You were not called to rebit that on the former trial?

A. No sir.

Q. You were in the court room?

A. I was in the court room.

Redirect examination.

By Mr. DYER:

Q. But the Postoffice Inspector in charge was called?

A. Yes sir.

Q. In reference to the same matter?
A. Yes sir.

Mr. LEHMANN: When counsel said the Postoffice Inspector in charge was called, he meant Mr. Vickery.
Mr. DYER: He was the Postoffice Inspector in charge at Washington at this time.

The government here rests.

And this was all the evidence offered or admitted.
453 At the close of all the evidence the defendant presented the following motion:

In the Circuit Court of the United States, Eastern Division of the Eastern District of Missouri.

UNITED STATES, Plaintiff,
*vs.*
JOSEPH RALPH BURTON, Defendant.

Comes now the defendant at the close of all the testimony in the case, and requests to instruct the jury as follows, viz:

I.

The court directs the jury to return a verdict of not guilty.

II.

The court directs the jury to return a verdict of not guilty as to count one of the indictment.

III.

The court directs the jury to return a verdict of not guilty as to count two of the indictment.

IV.

The Court directs the jury to return a verdict of not guilty as to count three of the indictment.

V.

The court directs the jury to return a verdict of not guilty as to count six of the indictment.

454 VI.

The Court directs the jury to return a verdict of not guilty as to count seven of the indictment.

VII.

The Court directs the jury to return a verdict of not guilty as to count eight of the indictment.

JOSEPH RALPH BURTON,
By F. W. LEHMANN AND
W. KNOX HAYNES,
*His Attorneys.*

The Court over-ruled said motions and each and every subdivision thereof and defendant excepted to the ruling of the court in said motion as an entirety and to the ruling on each subdivision of it.

Mr. Robb, of Counsel for the Government, presented oral argument to the jury.

After which the further hearing in the cause was adjourned until Saturday, November 25, 1905, at ten o'clock in the forenoon.

ST. LOUIS, *Saturday, November* 25, 1905.

Met pursuant to adjournment as above, on Saturday, November 25, 1905, at ten o'clock a. m., when the following proceedings were had:

Mr. W. Knox Hayes, of counsel for the defendant, presented oral argument to the jury.

Mr. Fred W. Lehmann, of counsel for the defendant, made oral argument to the jury.

After which Mr. D. P. Dyer, of counsel for the Government made the closing argument on behalf of the Government.

Thereupon the Court charged the jury as follows:

455 "GENTLEMEN OF THE JURY: The Court fully appreciates the close attention which you have so patiently given to the introduction of the evidence and to the arguments of counsel, and congratulates you that the arguments have been so superior, so complete and so enlightening that their effect can not be otherwise than to shorten and lessen your labor in considering and weighing the evidence, in extracting the truth from it and in reaching a verdict upon the ultimate question of the defendant's guilt or innocence.

The case is of great importance to the defendant, because it involves his reputation and his fidelity as a public servant. It is of like importance to the public, because it involves the right of the Government to inquire whether one occupying high official station has departed from the lines of fidelity and violated a statute intended to promote and secure independent, efficient and just action in the executive departments, and, if he has, to impose the punishment provided by law. But, while the case is somewhat unusual in these respects, the duties of the court and of the jury are not different from those which pertain to any other criminal accusation. It is the duty of the court to impartially determine all questions of law, and of the jury to impartially determine the question of fact.

456 The statute of the United States, upon which the indictment in this case is founded, provides that it shall be a criminal offence for a United States Senator, during his continuance in

office, to receive, or agree to receive, any compensation for any services rendered, or to be rendered, by him to any person or corporation in relation to any proceeding or other matter or thing, in which the United States is directly or indirectly interested, before any department, bureau, or officer of the United States. The reasons which underlie this statute are obvious, but it is not necessary to enumerate them, because, the statute being a law of the United States, is to be enforced in like manner as would be any other law of the Nation.

One of the great executive departments of the Government is known as the Post-Office Department. At the head of this is the Postmaster-General, who is assisted in the administration of the affairs of the department by various subordinates whose duties are to be performed under the direction or ultimate supervision of the Postmaster-General. Some of these subordinates are assigned to duty at Washington, and others are assigned to duty at various places throughout the United States.

The statutes of the United States authorize the Postmaser-General, upon evidence satisfactory to him, that any person or company is conducting any scheme or device for obtaining money through the mails by means of false or fraudulent pretenses, representations or promises, to forbid the payment by any postmaster to such person or company of any postal money order drawn to his or its order,
457 and to instruct postmasters at any postoffice at which letters arrive directed to such person or company, to return all such letters to the post office at which they were originally mailed, with the word "fraudulent" written or stamped thereon, and with directions that such letters be returned to the writers thereof. The instructions or directions which these statutes authorize the Postmaster-General to issue, have come to be commonly styled and known as a "Fraud Order," and they have been so spoken of in the evidence in this case. The chief purpose of such an order, as you will readily appreciate, is to cause the mail addressed to the person or company conducting the scheme or device to be returned to the person from whom it came, thereby preventing loss on their part and preventing the person or company conducting the scheme or device from obtaining, through the mails, any benefit from their false or fraudulent pretenses, representations or promises. The various steps taken under the direction of the Postmaster-General, or under the postal regulations which have been prescribed by him, to determine whether or not there is satisfactory evidence that any person or company is engaged in conducting such a scheme or device, constitute in the aggregate a proceeding before the Postoffice Department in which the United States is both directly and indirectly interested within the meaning of the statutes upon which this indictment is founded. Such a proceeding is equally a proceeding before he Postoffice Department at all times from the time it is originated until it is finally determined, without regard to whether it is at the time receiving the active attention of the Postmaster-General himself or of some of his subordinates at Washington or elsewhere. Such
458 proceedings quite frequently originate from the complaints of individuals not connected with the Postoffice Department,

but it is not necessary that they should originate in this way or that they should be preceded by any formal complaint. It is the duty of the Postmaster-General and his subordinates, on their own initiative, to originate and put in motion such a proceeding whenever in any manner matters come to their attention which in their judgment indicate that the mail privilege is being abused and violated in this respect.

The indictment is this case originally consisted of eight counts. Two of these, the fourth and fifth, have been eliminated and are not to be considered by you. Of the remaining counts, the first, second, sixth and eighth, in substance, charge the defendant, while a senator in Congress, with having agreed with the Rialto Grain and Securities Company, at Saint Louis, Missouri, on November 18, 1902, to receive from that company a stated compensation for services to be rendered by him to that company in relation to a proceeding then pending before the Postoffice Department to determine whether or not a fraud order should be issued against that company. The Third and seventh counts, in substance, charge the defendant, while a senator in Congress, with having received from the Rialto Grain and Securities Company, at St. Louis, Missouri, on March 26, 1903, a stated compensation for services rendered by him to that company between November 18, 1902, and March 26, 1903, in relation to a proceeding then pending before the Postoffice Department to determine whether or not a fraud order should be issued against that Company.

459 Some questions are common to all of these counts and mention of them will now be made.

(1.) Was the defendant a Senator of the United States for the State of Kansas during the times covered by the transactions under investigation? It is admitted that he was, and therefore you will have no difficulty in determining that.

(2.) Was the Rialto Grain and Securities Company an existing corporation carrying on business of the character described during the times covered by the transactions under investigation? There was proof that it was, and no proof to the contrary, so you will have no difficulty with that.

(3.) Was a proceeding pending before the Post Office Department from November 18th, 1902 to March 26th, 1903, to determine whether or not a fraud order should be issued against that Company?

If the evidence shows that the officers of the Post Office Department, at the instance of private individuals or otherwise, had before that time set on foot an inquiry to determine whether or not satisfactory evidence existed that the Rialto Grain and Securities Company was engaged in conducting a scheme or device for obtaining money through the mails by means of false or fraudulent pretenses, representations or promises, as charged in the indictment; and if the evidence further shows that that inquiry had not been concluded, and was, during the period named, in the charge of any of the officers of the Postoffice Department then charged with the performance of any duty in respect of such inquiry—then I charge you that there was such a pending proceeding before the Post Office

Department as is described in the indictment, and is referred to in the statutes before mentioned; and also that it was a proceeding in which the United States was both directly and indirectly interested.

460 The questions which relates exclusively to the counts charging the defendant with having agreed with the Rial- Grain and Securities Company at St. Louis, Missouri, to receive from that Company a stated compensation for services to be rendered by him to that Company in relation to the proceeding before named, are these:

)1.) Did he make such as agreement? That he made an agreement of some character to act as counsel for that Company for a stated compensation, is conceded. The real question is, whether that agreement included, among other matters in relation to which he was to serve the Company, the proceeding in the Post Office Department before named. Upon that question the evidence is conflicting, and it is your duty to weigh the evidence and determine the truth. If among other things it was intended by the defendant and the Rialto Grain and Securities Company in making the agreement that he would in part consideration for the compensation he was to receive, appear as agent or attorney of such Company before the Post Office. Department, or any of its officers charged with any duty or having any authority over such fraud order proceeding, for the purpose or with the intent of influencing or obtaining action on their part favorable to such Company in said proceeding, whether by way of stopping the investigation or ultimately preventing the issuance of a fraud order: then I charge you that the agreement of the defendant was violative of the statute; otherwise it was not. The offense prescribed in the statute consists in the agreement to receive compensation for the rendition of such services. The mere agreement to render the

461 services is not an offence. It is the agreement to receive compensation for the rendering of them which constitutes the offence. It should be carefully observed that the actual rendition of services is not a necessary element of this offence. The offence is complete and the defendant's guilt is established if the evidence shows that he made an agreement to render such services for compensation.

2. If there was an agreement on the part of the defendant to receive compensation for services to be rendered by him in such a fraud order proceeding, was the agreement made within the jurisdiction of this court—in other words, was it made in Saint Louis, Missouri? Upon this question I charge you that if such an agreement was negotiated or tentatively effected at some other place, but with the understanding on the part of the defendant that it should be communicated to the Rialto Grain and Securities Company at Saint Louis, Missouri, to be there accepted or ratified by that company before it should become effective and if thereafter, in pursuance of such understanding, the proposed or tentative agreement was communicated to the Rialto Grain and Securities Company at Saint Louis, Missouri, and was there accepted and ratified by that company without any change in its terms, then the agreement was made at Saint Louis, Missouri, and

within the jurisdiction of this court. The fact that the defendant was notified of such acceptance or ratification by a telegram or letter sent to him at Washington would not alter this result, if the circumstances under which the negotiations were had, and the tentative agreement was made, were such that it can be reasonably inferred that he contemplated and assented to notice of the acceptance
462 of his proposition being communicated to him through that medium.

The questions which relate exclusively to the counts that charge defendant with having received from the Rialto Grain and Securities Company compensation for services rendered by him to that company in relation to the proceedings before named, are these:

(1st.) Did he render any service for the Rialto Grain and Securities Company before the Postoffice Department in the proceeding named? On that question I charge you that if he appeared as agent or attorney of such company before the Postoffice Department, or any of its officers charged with any duty or having any authority over such fraud order proceeding, for the purpose or with the intent of influencing or obtaining action on their part favorable to such company in said proceeding, and did then by any statement representation respecting the business in which that company was engaged, or the manner in which it was conducting such business, endeavor to obtain any action favorable to such company on the part of the Postoffice Department, or any of its officers, in such fraud order proceeding, then he rendered service for said company within the meaning of the statute. And I further charge you that if he appeared as agent or attorney of such company before the Postoffice Department, or any of its officers charged with any duty or having any authority over such fraud order proceeding, for the purpose or with the intent of influencing them in respect of their action in said proceeding, and did then arrange with the department, or any of its officers, that a hearing should be had in respect of such matter, and then also
463 assured the department, or any of its said officers, that it was the purpose of said company to comply strictly with the law, and then also arranged that no action should be taken against said company in said proceeding without his being first notified thereof, that would constitute services within the meaning of the statute.

(2nd). Did he, at St. Louis, Missouri, on the 26th. day of March, 1903, receive from the Rialto Grain and Securities Company any payment of money as compensation for such services?

p.264 (Here followed the instructions, infra, which were given at the defendant's request.)

When a controversy arises as to what was the intention or purpose of the parties in entering into an agreement, the terms of which are in question, one of the safest and best indications of the true intent or purpose of the agreement is the practical interpretation given to it by the parties while they were engaged in its performance and before any controversy arose concerning it. Thus evidence of the actual conduct and acts of the parties relating to the subject matter of that agreement and occurring while they were engaged in executing it, is at times more persuasive and safer evidence of the actual character of

the agreement than is testimony coming from the parties after a controversy about it shall have arisen and at a time when their recollection may be dimmed by the lapse of time or when the accuracy of their testimony may be otherwise affected. This rule is of especial application in the instance of agreements made in violation of the law where there would be a motive to escape the legal or moral consequences of making such an agreement.

The indictment is not evidence in any sense, but is a mere accusation which it is incumbent upon the Government to sus-
464 tain by the measure of proof hereinafter stated.

Every defendant in a criminal case *is* presumed by the law to be innocent. This presumption exists in his favor, and abides with him as his sure protection, until his guilt is established by the measure of proof hereinafter stated. This presumption exists not only in respect of the accusation as a whole but also in respect of every material element of it.

The burden of proving guilt rests upon the Government, and must be sustained by evidence which establishes guilt beyond a reasonable doubt. By reasonable doubt is meant a doubt for which some good reason can be given based on the evidence or the absence of evidence. Speculative impressions or possibilities resting upon mere conjecture, not arising or deducible from the evidence or the absence of evidence, or a doubt suggested by the ingenuity of counsel or by your own ingenuity, or born of a merciful inclination to permit the accused to escape the penalty of the law, or one prompted by sympathy for him or those connected with him but not warranted by the evidence or the absence of evidence, is not what is meant by a reasonable doubt.

The law also presumes the defendant to have been a man of good reputation for honesty and integrity, but this presumed reputation constitutes in itself no defence to the accusation made in the indictment. It is, however, a matter favorable to the defendant which should be considered together with all the evidence in determining his guilt or innocence.

Bearing in mind these observations, it becomes your duty to carefully consider the evidence, and if as a result of such consid-
465 eration you can and do entertain a reasonable doubt of the defendant's guilt, it will be your duty to give him the benefit of that doubt and to acquit him. And if, on the other hand, the whole evidence, when carefully considered in the light of the presumptions named, produces in your mind a settled conviction and belief in the guilt of the defendant, such as you would be willing to act upon in the important affairs of life, you may be said to be free from a reasonable doubt and should accordingly return a verdict conforming to that conviction and belief.

The evidence bearing upon the issues submitted to you in this case embraces and involves such a variety of facts, circumstances and inferences—such a consideration of the credibility, character and personal interest of witnesses and parties—such a knowledge of the motives that actuate human thoughts, purposes and conduct—that a jury such as you, drawn from the body of the district, composed of men of varied and diversified pursuits, experienced with the affairs

of men and the motives which usually actuate them, is peculiarly qualified to properly, intelligently, honestly and fairly consider and weigh such evidence.

You are the sole judges of the credibility of the witnesses including the defendant, and of the weight to be attached to their testimony.

Upon finding a verdict of guilty or not guilty your duty is at an end. The responsibility of fixing the punishment, if there be a verdict of guilty, rests upon the Court.

A blank form of verdict will accompany these instructions.

466 The indictment will be handed to you by the clerk in order that you may have it with you during your deliberations."

Counsel for Defendant thereupon excepted to that portion of the charge which defined a proceeding within the meaning of the statute upon which the indictment is found, namely:

"The various steps taken under the direction of the Post Master General, or under the Postal Regulations which have been prescribed by him, to determine whether or not there is satisfactory evidence that any person or company is engaged in conducting such a scheme or device, constitute in the aggregate a proceeding before the Post Office Department in which the United States is both directly and indirectly interested within the meaning of the statute upon which this indictment is founded."

Because a proceeding as thus defined is not a proceeding within the meaning of the statute.

Counsel for Defendant also excepted to that portion of the charge further defining the proceeding meant by the statute, namely:

"Such a proceeding is equally a proceeding before the Post Office Department at all times from the time it is originated until it is finally determined, without regard to whether it is at the time receiving the active attention of the Post Master General himself or of some of his subordinates at Washington or elsewhere. Such proceedings quite frequently originate from the complaints of individuals not connected with the Post Office Department, but it is not necessary that they should originate in this way, or that they should be preceded by any formal complaint. It is the duty of the Post Master General and his subordinates, on their own initiative, to originate and put in motion such a proceeding whether in any manner matters come to their attention which in their judgment indicate that the mail privilege is being abused and violated in this respect."

467 Because a proceeding as thus defined is not a proceeding within the meaning of the statute.

Counsel for Defendant also excepted to that portion of the charge having reference to the venue of the agreement charged in the indictment, namely:

"If there was an agreement on the part of the defendant to receive compensation for services to be rendered by him in such a fraud order proceeding, was the agreement made within the jurisdiction of this court—in other words, was it made in Saint Louis, Missouri? Upon this question I charge you that if such an agreement was negotiated or tentatively effected at some other place, but with the under-

standing on the part of the defendant that it should be communicated to the Rialto Grain and Securities Company at Saint Louis, Missouri, to be there accepted or ratified by that company before it should become effective, and if thereafter, in pursuance of such understanding, the proposed or tentative agreement was communicated to the Rialto Grain and Securities Company at Saint Louis, Missouri, and was there accepted and ratified by that company without any change in its terms, then the agreement was made at Saint Louis, Missouri, and within the jurisdiction of this court. The fact that the Defendant was notified of such acceptance or ratification by a telegram or letter sent to him at Washington would not alter this result, if the circumstances under which the negotiations were had, and the tentative agreement was made, were such that it can be reasonably inferred that he contemplated and assented to notice of the acceptance of his proposition being communicated to him through that medium."

Because the proof shows that the venue of the agreement and of the offenses, if any, charged in the first, second, sixth, and eighth counts of the indictment was outside the State of Missouri, and outside the jurisdiction of the Court?

Counsel for Defendant also excepted to that portion of the charge which states what constitutes services before the Post Office Department within the meaning of the statute, namely:

"(1st). Did he render any service for the Rialto Grain and Securities Company before the Post Office Department in the proceeding named? On that question I charge you that if he appeared
468 as agent or attorney of such company before the Post Office Department, or any of its officers charged with any duty or having any authority over such fraud order proceeding, for the purpose or with the intent of influencing or obtaining action on their part favourable to such company in said proceeding, and did then by any statement or representation respecting the business in which that company was engaged, or the manner in which it was conducting such business, endeavor to obtain any action favorable to such company on the part of the Post Office Department, or any of its officers, in such fraud order proceeding, then he rendered service for said company within the meaning of the statute. And I further charge you that if he appeared as agent or attorney of such company before the Post Office Department, or any of its officers charged with any duty or having any authority over such fraud order proceeding, for the purpose or with the intent of influencing them in respect to their action in said proceeding, and did then arrange with the Department, or any of its officers, that a hearing should be had in respect of such matter, and then also assured the Department, or any of its said officers, that it was the purpose of said company to comply strictly with the law, and then also arranged that no action should be taken against said Company in said proceeding without his first being notified thereof, that would constitute service within the meaning of the statute."

Because the matters stated in said charge as constituting services are not services within the meaning of the statute, and are not services within the charge and description of the indictment; and because it

permits the finding by the Jury of services rendered before officers and persons not named in the indictment; and because it submits an issue to the Jury to be tried and found by them that is not averred in the indictment.

The Court also charged the jury, at the request of the Defendant, as follows: p. 268

3.

"Defendant had the right to engage, for compensation, as counsel in the case of the United States *vs.* Dennis, and to so whatever was necessary and proper to be done in the conduct of the defense, including inquiry and investigation at the Postal Department respecting evidence which might exist there, favorable or adverse to Dennis, and no service rendered by the defendant in connection with
469 defense of the case against Dennis can be considered in support of the indictment."

4.

"Any inquiries made, or services rendered, by the defendant in the Postal Department concerning the books of the Brooks Brokerage & Commission Company, and only concerning those books, are not to be considered as supporting any charge of the indictment."

7.

"To sustain the charge of the third or seventh count against the defendant, it is not sufficient to show that he was employed as general counsel by the Rialto Grain & Securities Company, and receive compensation as such, and that while employed as General Counsel he rendered services in or about the Postal Department, which were outside of and beyond his employment, but it must be further shown that the services rendered by him in and about the Postal Department were so rendered as within the scope and purpose of his employment, and were part of the services which he was to render as General Counsel and for which he was to receive compensation."

8.

"The presumption is that any agreement which parties may make, and which is lawful according to its terms, is lawfully intended, and any one asserting that such an agreement is merely a cloak or cover for an illegal purpose, must prove the same; and the agreement in this case between the Rialto Grain and Securities Company and the defendant, engaging him to act as its general counsel, is to be presumed to have meant what the parties thereto said; unless it is shown, when all of the surrounding circumstances are con-
470 sidered, that the agreement was a mere cover for an ulterior purpose, and that it was, in fact, intended by the parties that the defendant should render services in a proceeding looking to a fraud order pending in the Postal Department and was to be compensated therefor."

9.

"The evidence of what was done by the defendant in the matters of Bowman and Shove and McGowan cannot be considered by you as in themselves supporting any charge of the indictment, but they may be considered, with all the other evidence in determining the scope of the defendant's employment."

10.

"Services rendered or agreed to be rendered by the defendant in the Postal Department, which, coupled with the receipt of compensation, or agreement to receive compensation, therefor, would constitute an offence by the defendant, are not casual inquiries as to the fact of matters pending there, or casual statements respecting such matters made only as an incident of other business in which defendant might lawfully engage, but only services rendered *rendered* by defendant with the intent and purpose of influencing official action in the matter of the a "fraud order proceeding."

The Court also gave the following instruction at the request of the defendant.

6.

"As to any claims or demands made by individuals directly against the Rialto Grain and Securities Company, but not presented to the Post Office Department as the basis for a fraud order proceeding, the defendant had the right to act as counsel for the company, and as such counsel had the right to do whatever was necessary and
471 proper to conserve the legal rights and interests of his client as to such claims or demands, and he had the right in that connection and for that purpose to make inquiry of any Department to ascertain the identity of such persons and whether they held the positions they claimed to hold."

And then the defendant, by his counsel, before any instructions were given to the Jury, requested the Court to give the following instructions:

1.

"Whether the defendant can be adjudged guilty upon the first, second, sixth or eighth counts depends upon his having made an agreement in the City of St. Louis to receive compensation for services to be rendered the Rialto Grain and Securities Company in the way of preventing the issuance of a "fraud order" against the company by the Postmaster General. The service intended must be service in the Department before some official charged with the matter of inquiry and must have been intended to induce some official to report favorably to the Company upon the matter before him, or to decide some question touching a proposed or contemplated "fraud order" favorably to the company. The offense, if any exists, consists in the agreement to receive compensation for the rendition of

such service. It was the privilege of the defendant to make inquiries in the Postal Department as to the mere pendency of complaints and to report the result to the Company. The contemplated acts of the defendant for which he agreed to receive compensation must have been in the way of steps intended to prevent the issuance of a fraud order, or to bring about a favorable result in an inquiry which might lead to such an order, if such an inquiry was on foot
472 in the Department. If inquiries as to complaints were merely contemplated and no attempt to influence any officer in the discharge of his duty, then the agreement would involve no offense."

2.

Whether the defendant can be adjudged guilty upon the third or seventh count depends upon his having received compensation for service rendered to the Rialto Grain and Securities Company in seeking to prevent the issuance of a "fraud order" by the Postmaster General against the Company. The service must have been rendered in the Post Office Department before some officer charged with the matter of inquiry, and must have been intended to induce such officer to report favorably upon the matter before him, or to decide some question touching a proposed, or contemplated, "fraud order" favorably to the Company. The offense consists in the rendition intentionally of the service indicated and the receipt of compensation knowingly for the service so intentionally rendered. It was the privilege of the defendant, as a Senator of the United States, to make inquiries in the Post Office Department of any of its officers in regard to complaints against the Rialto Company, and to make reports as to the same to the Company. The acts of the defendant in the Department must have been in the way of steps against the United States to prevent the issuance of a "fraud order," if one was contemplated, or to bring about a favorable result in an inquiry which might lead to such an order, if such an inquiry was on foot in the Department. If inquiries as to complaints were merely made, and no attempt made to influence any officer in the discharge of his duty, the defendant committed no violation of the statute, no matter
473 what reports he made to his client, the Rialto Grain and Securities Company."

5.

"Defendant had the right to make inquiries at the Postal Department or of Postal officials as to the existence, or non-existence, of charges against the Rialto Grain and Securities Company, and the making of such inquiries, whether for his own information and guidance, or for the information and guidance of the company, will not support the indictment if there was no effort or purpose thereby to influence the action of any official of the government."

11.

"If the jury find from the evidence that a proposal for employment by the Rialto Grain and Securities Company was made by the

defendant to the attorney for the company, in the State of Illinois, and that no time for the beginning of such employment was contained in such proposal, and that the company in St. Louis, Missouri, assented to such proposal, coupling therewith the condition that the employment was to begin on that day, and so notified the defendant by letter or telegram or both, sent to him at Washington, in the District of Columbia, and the defendant at Washington assented to the terms thus proposed by the company, then they should find him not guilty as to the first, second, sixth and eighth counts."

12.

"If the jury find from the evidence that the defendant was employed by the Rialto Grain and Securities Company by the month, at a salary of five hundred dollars per month, for a period of not less than five months, and that for the month covered by the payment of March 26th, 1903, he rendered no services in the Postal
474 Department in any proceeding there pending looking to the issuance of a fraud order against the company, then they should find the defendant not guilty on the third and seventh counts."

13.

"The defendant is presumed to be innocent until he is shown beyond a reasonable doubt to be guilty, and this presumption of innocence is to be regarded by the jury as evidence in his favor applying not only to the whole case but to every material act of the defendant which appears from the evidence, and if the acts of the defendant appearing in evidence are consistent alike with guilt or with innocence, then that construction which harmonizes with innocence should be adopted by the Jury."

14.

"The law presumes the defendant to have been a man of good character and such presumption is to be considered as evidence in his favor in considering the question whether or not he is guilty of the charges against him and this presumption of good character may be a sufficient basis for reasonable doubt in the case, unless when considered with the other evidence in the case, the whole evidence should be so strong and convincing that no reasonable doubt of guilt arises in your minds."

All of which the Court refused.

To which refusal to give the foregoing instructions, Nos. 1, 2, 5, 11, 12, 13 and 14, and separately to the refusal to give each of them, the defendant, by his counsel, then and there, at the time, duly excepted.

All of which exceptions were taken at the time of the giving of said charge and before the jury retired and were allowed by the Court.

475 And afterwards, on the 27th day of November, 1905, Defendant filed his motion for a new trial, which is in words and figures as follows, to-wit:—

*Motion for New Trial.*

In the Circuit Court of the United States, Eastern Division, Eastern District of Missouri.

THE UNITED STATES
*vs.*
JOSEPH RALPH BURTON.

The defendant moves the court to grant him a new trial, because:

The Court erred in over-ruling the challenge of defendant to the juror William V. Jones, and in sustaining the challenge of the United States to the juror Hugo Koehler and in limiting the defendant to three peremptory challenges.

The court erred in admitting incompetent, immaterial and irrelevant evidence against the defendant and over his objection.

The court erred in excluding competent, material and relevant evidence offered by the defendant.

The court gave erroneous directions to the jury upon questions of law in the case.

The court refused proper instructions asked by defendant.

The court erred in refusing to direct a verdict for defendant.

The court erred in refusing to direct a verdict for the defendant on the first, second, sixth and eighth counts.

The verdict is against the law and the evidence and against the weight of the evidence.

F. W. LEHMANN,
W. KNOX HAYNES,
*Attorneys for Defendant.*

476 And afterwards on the twenty-ninth day of November, 1905, Defendant's said Motion for a New Trial was over-ruled; to which action of the Court in over-ruling said Motion for a New Trial defendant then and there excepted.

And afterwards on the twenty-ninth day of November, 1905, Defendant filed a Motion in arrest of judgment which is in words and figures as follows, to-wit:

*Motion in Arrest of Judgment.*

In the Circuit Court of the United States, Eastern Division, Eastern District of Missouri.

THE UNITED STATES
*vs.*
JOSEPH RALPH BURTON.

Comes now defendant and moves the court to arrest the judgment in the above entitled cause, because:

1. Neither count of the indictment states facts sufficient to constitute an offense against the laws of the United States.

2. Neither of the counts states facts showing the pendency of any matter or thing before the Postal Department of the United States in which the United States was interested.

3. The demurrer to the indictment should have been sussained as to each and every specification thereof.

4. The demurrer to the replication to the plea in bar of the third and seventh counts of the indictment should have been sustained.

5. The privilege of freedom from arrest granted to the defendant during the sessions of the Senate of the United States and in going to and returning from the same is not merely a personal privilege, but is a prohibition against arrest of or judicial proceedings against a member during a session of the Senate and for a reasonable period for going to and returning from the same which cannot be waived by such member.

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F. W. LEHMANN,
W. KNOX HAYNES,
*Attorneys for Defendant.*

Which motion was on said last named day overruled, to which tion of the Court in overruling said motion in arrest of judgment e Defendant then and there excepted.

And afterwards on the twenty ninth day of November A. D. 1905 d during said September A. D. 1905 Term of said Court, the efendant in open Court presented this his Bill of Exceptions, and ayed that the same be signed, sealed and filed and made a part of e record herein which is accordingly done this twenty ninth day November A. D. 1905.

WILLIS VAN DEVANTOR, [SEAL.]
*Circuit Judge.*

478 *(Assignment of Errors.)*

In the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri.

THE UNITED STATES
*vs.*
JOSEPH RALPH BURTON.

Assignment of Errors.

Now comes the defendant Joseph Ralph Burton and makes this, his assignment of errors, respectfully showing that the court below erred in each of the following particulars:

1.

The court erred in overruling the demurrer to the indictment and to each count thereof.

2.

The court erred in overruling the demurrer of the defendant to the plaintiff's replication or answer to his plea in bar to the third and seventh counts of the indictment.

3.

The court erred in denying defendant's plea in bar to the third and seventh counts of the indictment.

4.

The court erred in overruling the challenge for cause made by defendant to the juror William V. Jones, the said juror having shown that he had formed an opinion on the merits of the case by which his judgment would be influenced.

5.

The court erred in sustaining the challenge of the Government to the juror Hugo Koehler, said juror having shown himself to be entirely qualified to sit in the case.

6.

The court erred in refusing to allow the defendant more than three peremptory challenges to the jury.

479 7.

The court erred in the ruling made upon the testimony, admitting to be read in evidence against the defendant the letter of Bella Evans of Albany, New York, making complaint and charges against the

Rialto Grain & Securities Co. to the Postmaster General at Washington, D. C. and received by the Chief Clerk of the Post Office Department October 28th, 1902, without proof that the contents thereof ever became known to the defendant.

To the offer of this letter the defendant at the time objected as incompetent, and as not showing any matter or thing pending before the Post Office Department; and because the only fact open to consideration, upon the theory of the Government, was the filing of the letter, in the Department, and not the contents of the letter.

These objections were overruled by the Court and the letter was admitted in evidence.

8.

The Court erred in admitting in evidence against the defendant, the letter of Mrs. K. C. Hout, of Albany, New York, making complaint and charge against the Rialto Grain & Securities Company, addressed to the Postmaster General at Washington, D. C. and received by the Chief Clerk of the Post Office Department November 1st, 1902. To which letter the defendant objected upon all the grounds stated in his objection to the letter of Mrs. Bella Evans. Which objections were by the Court overruled; and the letter was admitted and received in evidence.

9.

The Court erred in admitting in evidence against the defendant, the letter making complaint and charge against the Rialto
480 Grain & Securities Co. written by Arthur M. Allen of New Brighton, Staten Island, New York, to the Postmaster General at Washington, D. C., and received by the Postmaster General on November 29th, 1902. To which letter the defendant objected on all the grounds stated in the objection to the letter of Bella Evans, and upon the further ground that there was no specification in any count of the indictment that any such thing as that constituted a part of the foundation of inquiry set on foot by the Postmaster General and because this letter was never brought to the knowledge of the defendant.

10.

The Court erred in admitting in evidence against the defendant the letter soliciting orders for December corn of the Rialto Grain and Securities Company, dated October 22nd, 1902, addressed to Arthur M. Allen, New Brighton, Staten Island, New York, and enclosed by him in his letter to the Postmaster General. The defendant objected to the admission of said letter upon all the grounds stated in the objections to the letter of Arthur M. Allen to the Postmaster General. Which objections were overruled by the Court and the letter was read in evidence.

11.

The Court erred in admitting in evidence against the defendant the booklet of the Rialto Grain and Securities Company, purporting

to show what profits might be made in corn and entitled "Golden Gain from Golden Grain," which was enclosed by the said Allen in his letter to the Postmaster General. The admission of this booklet in evidence was objected to upon all the grounds stated in the objections to the letter by the said Allen to the Postmaster General.

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12.

The Court erred in admitting in evidence against the defendant the letter of S. A. Warner of Pittsfield, Massachusetts, making complaint and charge against the Rialto Grain & Securities Co. addressed to the Postmaster General at Washington, D. C., and received there on January 16th, 1903. The defendant objected to the admission of such letter upon all the grounds stated in the objection to the letter of Arthur M. Allen to the Postmaster General, which objections were by the Court overruled, and the letter was read in evidence.

13.

The Court erred in admitting in evidence against the defendant the booklet of the Rialto Grain and Securities Company purporting to show what profits might be made by speculating in corn and entitled "Great Oaks from Tiny Acorns Grow;" which booklet was contained in the letter sent by S. A. Warner to the Postmaster General. And the defendant objected to the admission of said booklet in evidence upon all the grounds stated in the objection to the letter of said S. A. Warner, which objections were by the Court overruled and the booklet was received in evidence.

14.

The Court erred in admitting in evidence the letter making complaint and charge against the Rialto Grain and Securities Co. of F. R. Fravel, dated November 3rd. 1902, at Washington, D. C., addressed to the Postmaster General; and the defendant objected to the admission of said letter upon all the grounds stated in the objections made to the admission of the letter of said Allen to the Postmaster General; which objections were by the Court overruled, and the letter was received in evidence.

15.

The Court erred in admitting in evidence the letter of the Rialto Grain and Securities Company, dated October 29th, 1902, soliciting orders for speculative dealing in corn and addressed to F. R.
482 Fravel, at Washington, D. C., and enclosed by said Fravel in his letter to the Postmaster General; and the defendant objected to the admission of said letter upon all the grounds stated in the objections to the letter of said Fravel to the Postmaster General, which objections were by the Court overruled, and the letter was read in evidence.

16.

The Court erred in excluding from the evidence and from the consideration of the jury the endorsements on the duplicate or carbon jacket in Case No. 13,788 C showing the receipt of complaints against the Rialto Grain and Securities Co. from various persons by the Post Office Department at repeated intervals after March 26th, 1903 to April 29th, 1904.

17.

The Court erred in refusing to allow defendant to cross-examine the witness George M. Smith respecting the endorsements on the duplicate or carbon jacket forming the record of the Post Office Department relating to entries, reports and proceedings in Case No. 13,788 C after March 26th, 1903.

18.

The Court erred in admitting in evidence, against the objection of the defendant, the letter from Thomas B. Harlan to J. R. Burton, of date December 2, 1902, with reference to possible complaints against the Rialto Grain and Securities Co. because it is not shown that this letter was ever acted upon or answered by the defendant.

19.

The Court erred in admitting in evidence, over the objection of the defendant, the letter asking payment of salary for the Month of January 1903 from J. R. Burton to Thomas B. Harlan, of date January 19, 1903; the same being irrelevant to any issue in the case.

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20.

The Court erred in admitting in evidence, against the objection of the defendant, the letter enclosing check in payment of January, 1903 salary of date January 22, 1903, from the President of the Rialto Grain and Securities Co. to J. R. Burton, because the same was irrelevant to any issue in this case.

21.

The Court erred in admitting in evidence, against the objection of the defendant, the check of the Rialto Grain and Securities Company for Five Hundred Dollars, of date January 22, 1903, payable to the order of J. R. Burton, because same was irrelevant to any issue in this case.

22.

The Court erred in admitting in evidence against the objection of the defendant, the telegram from defendant to W. D. Mahaney, as follows: "Did you send paper Saturday? It has not arrived;" and the telegram of February 17, 1903, in reply thereto from W. D. Mahaney to the defendant: "Was called away unexpectedly Saturday.

Forgot to mail paper. It was sent yesterday;" and to further testify that the paper referred to in said telegrams was a check for Five Hundred Dollars for monthly salary due to the defendant in February; all such testimony being irrelevant to any issue in this case.

23.

The Court erred in permitting the witness Cochran to testify, against the objection of the defendant, in answer to the question whether the information that the witness Cochran gave to Burton was information that any one inquiring was entitled to, that I should have given any one inquiring, probably, the fact that a case had been made up, but I should not have given to him the names of the complainants;" and in permitting said witness to further testify that he had given to defendant the names of the complainants because the defendant was a Senator of the United States.

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24.

The Court erred in refusing to permit the witness Cochran on cross-examination to answer the question put to him by defendant's counsel: "So that never during this entire period (being the period from November 18, 1902, to March 26, 1903) did you have any information as to the justness of the complaints which were docketed there (office of the Chief Post Office Inspector)?

25.

The Court erred in admitting as evidence, against the objection of the defendant, the check of the Rialto Grain and Securities Company to J. R. Burton, for Five Hundred Dollars, of date December 15, 1902, in payment of the December 1902 salary, because the same was irrelevant to any issue in the case.

26.

The Court erred in over-ruling the motion of the defendant to strike out the testimony of the witness Francis C. Hubner as to a call by defendant at the office of the Assistant Attorney General for the Postal Department given on behalf of the United States.

27.

The Court erred in refusing, at the close of the case of the United States, to instruct the jury to return a verdict of not guilty upon the whole indictment and upon each count of the indictment.

28.

The Court erred in refusing to require the United States, at the close of its case, to elect upon which counts of the indictment it would proceed further.

29.

The Court erred in refusing to admit in evidence the report of Post

Office Inspectors Price and Piatt, to Hon. George A. Dice,
485 Inspector in Charge at St. Louis, Missouri, bearing date August 20, 1903; which report tended to show that from the date of the receipt of the first complaint at the Post Office Department against the Rjalto Grain and Securities Company, up to the date of the September report, that there had not been formulated for investigation by the Postmaster General or the Post Office Department, or by any officer of the Post Office Department, any case for determining the questions, whether the said Rialto Grain and Securities Company had been engaged in conducting a scheme for obtaining money from persons then resident in divers parts of the United States, through the mails of the United States, by means of false and fraudulent pretences, representations and promises made by said corporation to those persons, to the effect that it would invest such monies as might be sent to it for that purpose, in grain; and endeavor in good faith to so invest said monies as speedily to make substantial profits for the persons so sending the same; and make return of said monies or profits to such persons, and not convert such monies to its own use. Or whether or not the said Postmaster General should instruct the Postmaster at the Post Office at the said City of St. Louis aforesaid, to return all registered letters to the several Postmasters at the several postoffices at which the same were, or thereafter should be, originally mailed, with the word "fraudulent" plainly written or stamped upon the outside thereof. Or whether the said Postmaster General should forbid the payment by the said Postmaster at St. Louis, Missouri, aforesaid, to the said corporation of all postal monies drawn to its order or in its favor.

And which report tended to show that no investigation had been made, or question considered, or proceeding formulated by the Post Office Department in relation to the questions averred in the indictment during the period of said defendant's employment by said Rialto Grain and Securities Company, from the 18th day of November, 1902, to the 26th day of March, 1903. And which re-
486 port further tended to show that in the opinion of the United States Attorney at St. Louis, Missouri, no such question or proceeding as is in said indictment averred could be formulated or recommended for the consideration of the Postmaster General.

And which report tended to show that the subject of investigation of the Post Office Department was primarily whether or not the Rialto Grain and Securities Company, through its officers or agents had violated a criminal statute of the United States, known as Section 5480 of the Revised Satutes.

And that any information which might relate to a proceeding to be thereafter before the Postmaster General, of the nature described in the indictment, was a mere incidental gathering of facts by an investigating officer, having no direct reference to any proceeding pending, but with a view simply to gather such general information as might relate to the Company investigated.

And which report also tended to show that the action of the Postmaster General had in nowise been influenced by defendant.

30.

The Court erred in refusing to allow to be read in evidence, and excluding from the jury, the letter signed by Mr. C. H. Robb, Assistant Attorney General for the Post Office Department, bearing date September 9, 1903, which letter tended to indicate that the question of whether the said Rialto Grain and Securities Company had been and was engaged in conducting a scheme for obtaining money from persons then resident in divers parts of the United States, through the mails of the United States, by means of false and fraudulent representations and promises made by the said corporation in those persons, to the effect that it would invest such monies as might be sent to it for that purpose, in grain; and endeavor in good faith so to invest such monies as to speedily make substantial profits for the persons so sending the same, and make returns of such monies or profits to such persons, and not convert such monies to its own use, was for the first time formulated by any officer of the Post Office
487 Department, by him the said C. H. Robb, Assistant Attorney General for the Post Office Department, on the day of the date of said letter; that is, on the 9th day of September, 1903, and after the termination of the employment of the defendant by said Rialto Grain and Securities Company; and that said letter was the initial act tending to institute or put in operations any investigation by the Post Office Department of the questions averred in said indictment to have been on the 18th day of November, 1902, pending before the Post Office Department of the United States, and before a certain officer of that Department, to-wit the then Postmaster General of the said United States.

And said letter tended also to show that no action of any official of the Postal Department had in any wise been influenced by the defendant.

31.

The Court erred in refusing, at the close of the whole case, to instruct the jury to return a verdict of not guilty for the defendant upon each count of the indictment and upon the whole indictment.

32.

The Court erred in that portion of the charge which defined "a proceeding" within the meaning of the statute, upon which the indictment is found, by charging the jury in the following words:

"The various steps taken under the direction of the Post-Master General, or under the postal regulations which have been prescribed by him, to determine whether or not there is satisfactory evidence that any person or company is engaged in conducting such a scheme or device, constitute in the aggregate a proceeding before the Post-office Department in which the United States is both directly and indirectly interested, within the meaning of the statute upon which this indictment is founded."

33.

The Court erred also in that portion of the charge further defining the proceeding meant by the statute; and by charging the jury in the following words:

488 "Such a proceeding is equally a proceeding before the Post Office Department at all times from the time it is originated until it is finally determined, without regard to whether it is at the time receiving the active attention of the Post-master General himself or of some of his subordinates at Washington or elsewhere. Such proceedings quite frequently originate from the complaints of individuals not connected with the Post-office Department, but it is not necessary that they should originate in this way or that they should be preceded by any formal complaint. It is the duty of the Post-master General and his subordinates, on their own initiative, to originate and put in motion such a proceeding whenever in any manner matters come to their attention which in their judgment indicate that the mail privilege is being abused and violated in this respect."

34.

The Court erred in that portion of its charge which has reference to the place where the agreement charged in the indictment was made, by charging the jury in the following words:

"If there was an agreement on the part of the defendant to receive compensation for services to be rendered by him in such a fraud order proceeding, was the agreement made within the jurisdiction of this court—in other words, was it made in Saint Louis, Missouri? Upon this question I charge you that if such an agreement was negotiated or tentatively effected at some other place, but with the understanding on the part of the defendant that it should be communicated to the Rialto Grain and Securities Company at Saint Louis, Missouri, to be there accepted or ratified by that company before it should become effective, and if thereafter, in pursuance of such understanding, the proposed or tentative agreement was communicated to the Rialto Grain and Securities Company at Saint Louis, Missouri, and was there accepted and ratified by that company without any change in its terms, then the agreement was made at St. Louis, Missouri, and within the jurisdiction of this court. The fact that the defendant was notified of such acceptance or ratification by a telegram or letter sent to him At Washington would not alter this result, if the circumstances under which the negotiations were had, and the tentative agreement was made, were such that it can reasonably be inferred that he contemplated and assented to notice of the acceptance of his proposition being communicated to him through that medium.

35.

The Court erred in that portion of its charge which states what constitutes service before the Post-office Department, within the meaning of the statute; and in charging the jury in the following words:

"First, Did he render any service for the Rialto Grain and Securities Company before the Postoffice Department in the proceeding

named? On that question I charge you that if he appeared as agent or attorney of such company before the Post-Office Department, or any of its officers, charged with any duty or having any au-
489 thority over such fraud order proceeding, for the purpose or with the intent of influencing or obtaining action on their part favorable to such company in said proceeding, and did then by any statement or representation respecting the business in which that company was engaged, or the manner in which it was conducting such business, endeavor to obtain any action favorable to such company on the part of the Postoffice Department, or any of its officers, in such fraud order proceeding, then he rendered service for said company within the meaning of the statute, and I further charge you that if he appeared as agent or attorney of such company before the Postoffice Department or any of its officers charged with any duty or having any authority over such fraud order proceeding for the purpose or with the intent of influencing them in respect of their action in said proceeding and did then arrange with the department or any of its officers that a hearing should be had in respect of such matters. And then also assured the defendant or any of its said officers that it was the purpose of said company to comply directly with the law, and then also arraigned that no action should be taken against said company in said proceeding without first being notified thereof, that would constitute services within the meaning of the statute."

36.

The Court erred in refusing to charge and instruct the jury in accordance with defendant's request, as follows:

"Whether the defendant can be adjudged guilty upon the first, second, sixth or eighth counts depends upon his having made an agreement in the City of St. Louis to receive compensation for services to be rendered the Rialto Grain and Securities Company in the way of preventing the issuance of a "fraud order" against the company by the Postmaster General. The service intended must be service in the Department before some official charged with the matter of inquiry and must have been intended to induce some official to report favorably to the Company upon the matter before him, or to decide some question touching a proposed or contemplated "fraud order" favorably to the Company. The offense, if any exist, consists in the agreement to receive compensation for the rendition of such service. It was the privilege of the defendant to make inquiries in the Postal Department as to the mere pendency of complaints and to report the result to the Company. The contemplated acts of the defendant for which he agreed to receive compensation must have been in the way of steps intended to prevent the issuance of a fraud order, or to bring about a favorable result in an inquiry which might lead to such an order, if such an inquiry was on foot in the department. If inquiries as to complaints were merely contemplated and no attempt to influence any officer in the discharge of his duty then the agreement would involve no offence."

37.

The Court erred in refusing to charge and instruct the jury in accordance with defendant's request, as follows:

"Whether the defendant can be adjudged guilty upon the third or seventh counts depends upon his having received compensation for service rendered to the Rialto Grain and Securities Company in seeking to prevent the issuance of a "fraud order" by the Post-
490 master General against the Company. The service must have been rendered in the Postoffice Department before some officer charged with the matter of inquiry, and must have been intended to induce such officer to report favorably upon the matter before him, or to decide some question touching a proposed, or contemplated, "fraud order" favorably to the Company. The offence consists in the rendition intentionally of the service indicated and the receipt of compensation knowingly for the service so intentionally rendered. It was the privilege of the defendant, as a Senator of the United States, to make inquiries in the Post Office Department of any of its officers in regard to complaints against the Rialto Company, and to make reports as to the same to the Company. The acts of the defendant in the Department must have been in the way of steps against the United States to prevent the issuance of a "fraud order", if one was contemplated or to bring about a favorable result in an inquiry which might lead to such an order, if such an inquiry was on foot in the Department. If inquiries as to complaints were merely made, and no attempt made to influence any officer in the discharge of his duty, the defendant committed no violation of the statute, no matter what reports he made to his client, the Rialto Grain and Securities Company."

38.

The Court erred in refusing to charge and instruct the jury in accordance with defendant's request, as follows:

"Defendant had the right to make inquiries at the Postal Department or of Postal officials as to the existence, or non-existence, of charges against the Rialto Grain and Securities Company, and the making of such inquiries, whether for his own information and guidance, or for the information and guidance of the company, will not support the indictemnt if there was no effort or purpose thereby to influence the action of any official of the government."

39.

The Court erred in refusing to charge and instruct the jury in accordance with defendant's request, as follows:

"If the jury find from the evidence that a proposal for employment by the Rialto Grain and Securities Company was made by the defendant to the attorney for the company, in the State of Illinois, and that no time for the beginning of such employment was contained in such proposal, and that the company in Saint Louis, Missouri, assented to such proposal, coupling therewith the condition that the employment was to begin on that day, and so notified the defendant

by letter or telegram or both, sent to him at Washington, in the District of Columbia, and the defendant at Washington assented to the terms thus proposed by the company, then they should find him not guilty as to the first, second, sixth and eighth counts."

40.

The Court erred in refusing to charge and instruct the jury in accordance with defendant's request, as follows:

"If the jury find from the evidence that the defendant was employed by the Rialto Grain and Securities Company by the
491 month, at a salary of five hundred dollars per month, for a period of not less than five months, and that for the month covered by the payment of March 26th, 1903, he rendered no services in the Postal Department in any proceeding there pending looking to the issuance of a fraud order against the company, then they should find the defendant not guilty on the third and seventh counts."

41.

The Court erred in refusing to charge and instruct the jury in accordance with defendant's request, as follows:

"The defendant is presumed to be innocent until he is shown beyond a reasonable doubt to be guilty, and this presumption of innocence is to be regarded by the jury as evidence in his favor applying not only to the whole case but to every material act of the defendant which appears from the evidence, and if the acts of the defendant appearing in evidence are consistent alike with guilt or with innocence, then that construction which harmonizes with innocence should be adopted by the jury."

42.

The Court erred in refusing to charge and instruct the jury in accordance with defendant's request, as follows:

"The law presumes the defendant to have been a man of good character and such presumption is to be considered as evidence in his favor in considering the question whether or not he is guilty of the charges against him, and this presumption of good character may be a sufficient basis for reasonable doubt in the case, unless when considered with the other evidence in the case, the whole evidence should be so strong and convincing that no reasonable doubt of such guilt arises in your minds."

43.

The Court erred in over-ruling defendant's motion for a new trial.

44.

The Court erred in over-ruling defendant's motion in arrest of judgment.

45.

The Court erred in rendering judgment and sentence herein upon
he defendant.

And the defendant prays that the said judgment and sentence
erein be reversed, set aside and held for naught.

JOSEPH RALPH BURTON,
By F. W. LEHMANN AND
W. KNOX HAYNES,
*His Attorneys.*

92 UNITED STATES OF AMERICA,
*State of Missouri, City of St. Louis, ss:*

*Petition for a Writ of Error by Defendant.*

the Circuit Court of the United States, Eastern Division, Eastern
District of Missouri.

THE UNITED STATES OF AMERICA
*vs.*
JOSEPH RALPH BURTON.

Joseph Ralph Burton, defendant in the above entitled cause,
eling himself aggrieved by the verdict of the jury and the judg-
ent entered on the 29th day of November, 1905, comes now by his
torneys and shows to the court that in this cause by the said verdict
d judgment and sentence he was convicted of an infamous crime,
d also shows that the case involves the construction or application,
both, of the Constitution of the United States and of the fifth and
xth amendments thereof, and also shows that the case involves the
ns tutionality of a law of the United States; and now here by pe-
ions the said court for an order allowing the defendant to prose-
te a writ of error to the honorable the Supreme Court of the
nited States under and according to the laws of the United States
that behalf made and provided, and also that an order be made
ing the amount of security which the defendant shall give and fur-
sh upon such writ of error, and that upon the giving of such se-
rity all further proceedings in this court be suspended and stayed
til the determination of the said writ of error by the Supreme
urt of the United States.

Wherefore this defendant prays for the allowance of a writ of error
and for an order fixing the amount of said bond and for such
93 further orders and process as may cause the errors complained
of to be corrected by the said Supreme Court of the United
ates, and said verdict, judgment and sentence to be set aside.
nd your petitioner will ever pray.

F. W. LEHMANN,
W. KNOX HAYNES,
*Attorneys for Defendant.*

(*Bond.*)

In the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri.

THE UNITED STATES
*vs.*
JOSEPH RALPH BURTON.

*Supersedeas Bond.*

Know all men by these presents, that we, Joseph Ralph Burton as principal, and Richard C. Kerens, as surety, are held and firmly bound unto the United States of America in the sum of Five Thousand Dollars to which payment, well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 29th day of November, in the year of our Lord, one thousand nine hundred and five.

Whereas, lately, at the September term, A. D., 1905, of the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri, in a suit pending in said court between the United States of America and Joseph Ralph Burton, defendant, a judgment and sentence was rendered against the said Joseph Ralph Burton, and the said Joseph Ralph Burton has obtained a
494 writ of error from the Supreme Court of the United States to reverse the judgment and sentence in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing the United States of America to be and appear in the Supreme Court of the United States, at the City of Washington, D. C., thirty days from and after the date of said citation, which citation has been duly served.

Now, the condition of the above obligation is such, that if the said Joseph Ralph Burton shall appear, either in person or by attorney, in the Supreme Court of the United States, on such day or days as may be appointed for the hearing of said cause in said court, and prosecute his said writ of error, and shall abide by and obey all orders made by the United States Supreme Court, and shall surrender himself in execution of the judgment and sentence appealed from as said court may direct, if the judgment and sentence against him shall be affirmed; and if he shall appear for trial in the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri on such day or days as may be appointed for a retrial by said Circuit Court, and abide by and obey all orders made by said court provided the judgment and sentence against him shall be reversed by the Supreme Court of the United States, then the above

obligation to be void, otherwise to remain in full force, virtue and effect.

JOSEPH RALPH BURTON. [SEAL.]
RICHARD C. KERENS [SEAL.]

Witness as to all names:
JAMES R. GRAY,
*Clerk of said Court.*

Approved:
WILLIS VAN DEVANTER,
*Judge Circuit Court U. S.*

495 (*Opinion on Defendant's Motion to Direct Verdict.*)

In ruling on the motion made by defendant for a directed verdict in his favor on the evidence introduced by the Government, the court said (in the absence of the jury):

The indictment, in different counts, charges two offenses: One that the defendant agreed to receive compensation for services to be rendered by him, of the character described in the indictment. The other, that he did receive compensation for such services.

The first question presented by the present motion has to do only with the place where the first offense was committed. The charge is, that the agreement was made here in the Eastern Division of the Eastern District—in other words, in St. Louis.

It is true as has been stated by counsel, that we may not here try the defendant for an offense committed in some other place; and it does not make any difference how strong the evidence is, if in fact it puts the commission of the offense in some other place.

There is evidence which shows that the negotiations out of which an agreement is said to have arisen were had on a train somewhere between here and Chicago, but outside of this district.

The negotiations were between a representative of the Rialto Grain & Securities Company on the one hand and the defendant on the other. The defendant, of course, had full capacity to represent himself. The representative of the Company, as it appears, was not authorized to make a completed contract or agreement in behalf of the company. He was, as it appears, deputed to negotiate in respect of an agreement, but whether the company would adopt the result of the negotiations was not to be determined until the matter was submitted to it. The negotiations resulted in a tenta-
496 tive agreement or proposal by the defendant, the terms of which were to the effect that he would accept employment, not for one month's pay, but for at least five months' pay, or twenty-five hundred dollars. Nothing was said about the time when the services should begin. The representative of the Company was to return to St. Louis and submit the result of the negotiations to his company. This was done. The company determined to make the contract proposed in the negotiations. Thereupon, under the authorization of the company, the representative who had conducted

the negotiations telegraphed and wrote to the defendant, who was in Washington, saying that his services were accepted upon the terms stated by him, "the services to begin from this date."

It was known when the negotiations on the train were completed that the Rialto Grain & Securities Company was here in St. Louis; that the defendant was going to and was to remain in Washington; that the usual means of communication in business transactions between those two places were the telegraph and the mail. The implication was, of course, that the action of the company would be communicated to the defendant at Washington by the use of one or the other of these instrumentalities.

The defendant had held nothing in reserve. There was no matter in respect of which his proposal was incomplete. While I do not want to speak of it literally as a proposition submitted by him, yet in legal effect it is much the same as if it had been such. The representative of the Company who participated in the negotiations was made the conduit through which the result of the negotiations, the proposition of the defendant, was to be submitted to the company for its acceptance or rejection.

497 It is said that the negotiations did not start in this district. That is true. It is said that the defendant was not thereafter here participating in the negotiations. That is true. It is said that no agreement was made on the train, because the Rialto Grain & Securities Company was not there represented by any one authorized to bind it. That is true. It is said that action on the part of the company was then reserved, and that, therefore, there was not any agreement until the defendant, at Washington, received notice of what was done in respect of his proposition by the Company, and that in consequence the agreement, if one was made, was made at Washington.

The statute uses the word "agree," but it does not say "agree with some other person." It has been well said to-day that the word "agree" is used in two senses, the one unilateral and the other bilateral—the one partaking somewhat of the character of an offer or a proposal, a frequent use of the word, and the other indicating the meeting of two minds or the making of reciprocal promises.

If the word "agree" is used in the unilateral sense, so that it would be an offense if a Senator in Congress were to offer or propose to another person to render services in a proceeding of the character described for a compensation to be paid to such Senator, then the offense was complete when, through the chosen conduit, the proposition of the defendant was communicated in St. Louis to the company pursuant to the understanding reached in the negotiations. So I say, that if the word "agree" is used in the unilateral sense, then when the chosen agency, acting in pursuance of the negotiations had on the train, laid the defendant's proposition before the directors or chief officers of the Rialto Grain & Securities Company in St.

498 Louis, the offense of "agreeing" was complete, and it was committed in St. Louis. As was said, the offense is not committed by going upon the housetops and proclaiming generally a proposition. There must be something more definite. The proposi-

tion must be addressed to some one who has capacity to act upon it and must be made with the intention that it shall be acted upon. In its very nature, the defendant's proposition was addressed to the company and was to be communicated to it at St. Louis, with the intent that it should be acted upon by that company.

But I need not just now determine whether the word is used in the statute in a unilateral sense, or in the bilateral sense. If it was used in the latter, then there must have been a concurrence of minds; the minds of the two parties must have been *at* one, the parties being the defendant and the Rialto Grain & Securities Company.

It is said that if the word be used in that sense, this offense was not committed in this district, because the defendant's proposition was not accepted as made, and, therefore, the two minds did not come to a common point here in St. Louis. It is said that the negotiations upon the train did not have in them any element of time in respect of the beginning of the service; that such an element was first suggested by the telegram and letter sent from here to Washington, and that thus a new term was imposed, without concurrence in which by the defendant there would not be any agreement.

I do not understand that this is correct.

There was, according to the evidence, no statement in the negotiations on the train in respect to the time when the services should begin. But in the absence of some specific statement upon the subject, the implication was unquestionably that the service was
499 to begin whenever the proposition was accepted. When it is the purpose of parties who are entering into an agreement that it shall be operative from the time that it is made, it is not necessary for them to say that; but when they intend that it shall be operative only after thirty, sixty, or some other number of days in the future, then that is necessary to be stated, because, in the absence of any statement or provision indicating the contrary, an agreement is operative from the time it is made.

So here the proposal was to render services for a specified compensation, for a period of not less than five months. The acceptance was of that very thing, with the statement that the services should begin at once, a thing which would have been true if nothing on that subject had been said. Unless that which is added to an acceptance constitutes a change in the terms of the proposition accepted the acceptance is in effect an unqualified one.

It was known, as I have said, that the acceptance of the Rialto Grain & Securities Company could only be had here. It was known that the defendant was going to Washington. It was known that the usual means of communication between those places were the telegraph and the mails. The implication was that they should be employed.

This brings us to the ordinary rule in respect of commercial contracts applicable to such a situation, that in the absence of some agreement to the contrary, the deposit of an unqualified acceptance in the chosen medium of communication constitutes an acceptance at that place and makes it the place where the contract is made.

500 If this had been an enforceable contract, which of course it was not if it was in violation of the law, it would not have been competent for the Rialto Grain & Securities Company to withdraw its acceptance after it was deposited in the mails.

And this works no hardship. It cannot result in the conviction of one for an unconscious act. It was contemplated by the parties to the negotiations that the defendant's proposition should be brought to St. Louis and there accepted, or rejected, and the acceptance or rejection communicated to him b ythe telegraph or the mail. All this was contemplated in the negotiations in which the defendant was a conscious participant.

So, if the term "agree" is used in the bilateral sense, the evidence shows that this was the place where the agreement was made.

The cases cited in which statutes require the giving of notice before some particular duty shall arise are not applicable here, as it seems to me, because such statutes obviously mean a personal notice to be communicated at some time in the future, and this requirement is one in subordination to which all must act in making or accepting proposals of the character affected by such statutes.

I have thus indicated the reasons why I think the defendant's proposition was accepted in St. Louis without qualification and why at the moment the two minds met an agreement was effected.

I think a verdict can not be directed on the counts charging an agreement to receive, based upon any want of jurisdiction in this district.

With respect to the motion that there shall be a directed
501 verdict on the counts charging a receipt of money here in St. Louis, March 26, I have this to say:

It is argued that the contract or undertaking was divisible by months, and each month was to be by itself, a separate interval—that is, for services for November there was to be a November payment, and then for the services in the succeeding month there was to be another payment, and the payment in any particular month was to be in no respect compensatory of the services rendered in any other month.

I do not understand the testimony to be of that character, and, if I were to accede to the contention that there is no evidence of the rendition of service during the fifth month, the rule respecting the divisibility of contracts would not be applicable here, because the testimony is clearly, as I recall it, that the defendant said he was not willing to serve one month and take five hundred dollars for it, and that because of this the agreement was that he should receive at least five months' compensation, however much, or however little, the service might be. That being true, the contract, while for convenience providing for payment of the compensation in monthly installments, was not divisible in the sense suggested, but was an entirety and each payment thereunder was to be in part consideration for the entire service.

The motion to direct a verdict will be denied.

502 *Certificate.*

I, James R. Gray, Clerk of the Circuit Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri do hereby certify that the above and foregoing is a full, true and complete transcript of the record and proceedings in the above-entitled cause, together with all things concerning the same, as fully as the same remains on file and of record in said cause in my office; and that the original Citation and Writ of Error are hereto attached and herewith returned; all as fully as in the said Writ I am commanded.

Witness my hand and seal at office in the City of St. Louis, in said Division of said District, this 3rd day of January, A. D. 1906.

[Seal of the United States Circuit Court, Eastern Division of the Eastern Judicial District of Missouri.]

JAMES R. GRAY,
*Clerk of said Court.*

Endorsed on cover: File No. 20,041. E. Missouri C. C. U. S. Term No. 539. Joseph Ralph Burton, plaintiff in error, *vs.* The United States. Filed January 8th, 1906. File No. 20,041.

FILE COPY.

FILED
JAN 20 1906

No. 539.

# In the Supreme Court of the United States.

OCTOBER TERM, 1905.

JOSEPH RALPH BURTON, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.

MOTION TO ADVANCE.

# No. 539.

# In the Supreme Court of the United States.

OCTOBER TERM, 1905.

---

JOSEPH RALPH BURTON, PLAINTIFF IN ERROR,

*v.*

THE UNITED STATES.

---

## MOTION TO ADVANCE.

The Solicitor-General on behalf of the United States, respectfully moves the court to advance the above-entitled cause on the docket for early hearing.

The plaintiff in error, the defendant below, was originally indicted on the 23d day of January, 1904, for violating section 1782 of the Revised Statutes of the United States. His trial and conviction followed in March, 1904, and the case was brought to this court by writ of error. Upon motion of the plaintiff in error the hearing of the cause was advanced. On January 16, 1905, this court reversed the judgment of the District Court and remanded the cause, with direction to grant a new trial.

The plaintiff in error was reindicted for violating said section 1782, Revised Statutes, and his second trial and conviction followed in November, 1905.

16814—06

He was elected United States Senator for the State of Kansas for a term of six years, expiring on the 4th day of March, 1907. He has not resigned, neither has he participated in the deliberations of the Senate since his original indictment on January 23, 1904.

It will thus be seen that the State of Kansas has been without its full representation in the Senate for a period of nearly two years. Under the provisions of the statute, if the judgment of the court below is sustained, the office of plaintiff in error is *ipso facto* vacated. It is therefore of great importance to the people and State of Kansas, that this case be determined at an early date. The interests of the General Government will also be subserved by an early hearing.

HENRY M. HOYT,
*Solicitor-General.*

O

FILE COPY.

# Supreme Court of the United States.

OCTOBER TERM, 1905.

Office Supreme Court U. S.
FILED
MAR 26 1906
JAMES H. MCKENNEY,
Clerk

JOSEPH RALPH BURTON,
*Plaintiff in Error,*

*vs.*

THE UNITED STATES,
*Defendant in Error.*

No. 539.

In Error to the Circuit Court of the United States, for the Eastern District of Missouri.

## Statement, Brief and Argument for Plaintiff in Error.

JOHN F. DILLON,
HARRY HUBBARD,
W. H. ROSSINGTON,
W. KNOX HAYNES,
F. W. LEHMANN,
*For Plaintiff in Error.*

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# Supreme Court of the United States.

**OCTOBER TERM, 1905.**

JOSEPH RALPH BURTON,
*Plaintiff in Error,*

*vs.*

THE UNITED STATES,
*Defendant in Error.*

**No. 539.**

**In Error to the Circuit Court of the United States, for the Eastern District of Missouri.**

## STATEMENT, BRIEF AND ARGUMENT FOR THE PLAINTIFF IN ERROR.

### THE PROCEEDINGS.

The indictment was returned by the Grand Jury of the Circuit Court on the 10th day of November, 1905, and contained eight counts.

On the 14th of November, 1905, the defendant demurred to the indictment and to its several counts. The prosecutor

on the 15th day of November dismissed the case as to the fourth and fifth counts, and thereafter on the same day the demurrrer was overruled.

On the same day the defendant filed a plea in bar as to the third and seventh counts of the indictment.

On the 16th day of November the plaintiff filed a replication to the plea in bar and the defendant moved to strike it from the files. Upon motion of the District Attorney, the replication was withdrawn with leave to file an amended replication.

On the 17th of November an amended replication was filed.

On the 18th of November a demurrer to the replication was filed, argued and overruled, and judgment denying the plea was entered against the defendant.

On the same day the defendant entered his plea of not guilty.

The trial of the case was begun on the 20th of November, and continued from day to day until and including the 25th day of November, when a verdict was returned finding defendant guilty on all the remaining counts of the indictment.

On the 27th day of November the defendant filed a motion for new trial, which was overruled on the 29th of November. On the last named day a motion in arrest of judgment was filed, and on the same day overruled.

On the 29th of November the Court entered judgment upon the sixth count of the indictment, sentencing defendant to six months' imprisonment in the county jail of Iron County, Missouri, and imposing a fine of two thousand dollars, and entered judgment upon the seventh count of the indictment, sentencing defendant to six months' imprisonment in the same jail, the term to begin and run concurrently with the first term of imprisonment, and imposing a fine of five hundred dollars. And it appearing that the first, second and eighth counts of the indictment cover the same

transaction and offense embraced in the sixth count, and that the third count covers the same transaction embraced in the seventh count, it was ordered that no judgment or sentence be pronounced upon the first, second, third, and eighth counts.

On the same day, the 29th of November, a bill of exceptions was allowed and made a part of the record of the cause, a petition for a writ of error, accompanied by assignments of error, was presented, the writ of error was allowed, citation issued and all the steps essential to perfect the appeal taken.

## THE INDICTMENT.

The indictment is founded upon section 1782 R. S. U. S., which is as follows, viz:

### Upon Taking Compensation in Matters to which United States is a Party.

> "No Senator, Representative, or Delegate, after his election and during his continuance in office, and no head of a Department, or other officer or clerk in the employ of the Government, shall receive or agree to receive any compensation whatever, directly or indirectly, for any services rendered, or to be rendered, to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party, or directly or indirectly interested, before any Department, court-martial, bureau, officer, or any civil, military, or naval commission whatever. Every person offending against this section shall be deemed guilty of a misdemeanor, and shall be imprisoned not more than two years, and fined not more than ten thousand dollars, and shall, moreover, by conviction thereof, be rendered forever thereafter incapable of holding any office of honor, trust, or profit under the Government of the United States."

As submitted to the jury, the indictment contained six counts.

The first, second, sixth and eighth counts were intended to charge and cover the same transaction and the same offense, that of agreeing, on the 18th of November, 1902, to receive compensation for services to be rendered by the defendant while a Senator of the United States, in a proceeding pending before a Department of the United States.

The third and seventh counts were intended to charge and cover the same transaction and the same offense, that of receiving, on the 26th day of March, 1903, compensation for services rendered while a United States Senator, in a proceeding pending before a Department of the United States.

The rendition of service and receipt of compensation therefor, charged in the third and seventh counts of the indictments, were in pursuance and performance of the agreement alleged in the first, second, sixth and eighth counts.

## THE SIXTH COUNT.

The sixth count (Rec. p. 11) charges that:

During the time involved the defendant was a Senator of the United States from the State of Kansas.

The Rialto Grain and Securities Company, a corporation, was pretending to carry on the business of a broker in grain and securities on its own account and as agent for others, and of making speculative investments in such commodities, with its principal offices in St. Louis, Missouri.

There was pending before the Post Office Department and before the Postmaster General a proceeding in which the United States was indirectly interested, to determine whether the Rialto Company was engaged in conducting a scheme for obtaining money through the mails by means of false and fraudulent pretenses, and whether the Postmaster General, should issue a fraud order against the company.

The defendant, on the 18th of November, 1902, at the City of St. Louis, Missouri, knowing this proceeding to be pending, agreed with the Rialto Company to receive from

it twenty-five hundred dollars as compensation for appearing before the Post Office Department, the Postmaster General, the Chief Post Office Inspector, the Assistant Attorney General for the Post Office Department, and other officers of the Post Office Department, as agent and attorney for the Rialto Company, and obtaining information for the Company concerning the proceeding before mentioned, and by the influence of his presence and of his office as Senator, and by statements, representations and persuasion inducing the Postmaster General to believe that the Rialto Company was not conducting any such fraudulent scheme as that mentioned and to put a stop to any further investigation of the matter, and to refrain from determining it adversely to the Company, and from issuing a fraud order.

The other counts of the indictment charging an agreement to receive, it is not necessary to set out, as they involve no questions not presented by the sixth count.

## THE SEVENTH COUNT.

The seventh count (Rec. p. 13) charges that the defendant, being at the time involved a Senator of the United States from the State of Kansas, did, on divers days between the 18th day of November, 1902, and the 26th day of March, 1903, render the services described in the sixth count before the Postmaster General of the United States and the Post Office Department, the same being, as he well knew, services in relation to the proceeding described in the sixth count, and did receive from the Rialto Company five hundred dollars as compensation for such services.

The third count is also for receiving compensation, and it is not necessary to set that out.

## THE DEMURRER.

The defendant (Rec. 17) demurred to the indictment,

To all the counts because: (1) the alleged proceeding be-

fore the Postal Department was not one in which the United States was interested, or to which it was a party; (2) they failed to state facts showing any offense by the defendant; (3) they did not inform the defendant of the nature and cause of his accusation; (4) they stated no facts showing that there was any proceeding pending before the Postal Department; and (5) they did not state what services were rendered, or that he agreed to render any services whatever.

To the sixth and related counts that they fail to show, that the defendant agreed to render the services mentioned, or that he knew when making the agreement that the services to be rendered or required of him were to consist of the acts or things mentioned, or that the defendant knew that any of the acts to be done as alleged in the indictment would or could influence the action of any official of the Department.

To the third and seventh counts that they fail to aver that any services were rendered by the defendant, or that anything done by him was intended or calculated to influence the action of any official of the Postal Department.

## THE PLEA IN BAR.

The plea in bar (Rec. 20) was to the third and seventh counts of the indictment. It alleged a former trial and acquittal of the defendant upon an indictment covering the same transaction and the same offense. The details of the plea are not necessary to be set out further at this time than that as to the receipt of the money the first indictment alleged that the defendant "did receive Five Hundred Dollars from one W. D. Mahaney, an officer and employe of the Rialto Grain and Securities Company as compensation, etc.," and it is alleged that this act of so receiving the money is the same identical act and transaction and the same identical means of payment charged and intended to be charged in the indictment in the case at bar.

## THE REPLICATION.

The replication (Rec. 24) alleges that in the first indictment there were three counts with respect to this transaction. In the first two counts the charge was that the defendant accepted and received the money from the Rialto Grain and Securities Company, and in the third the charge was that the defendant accepted and received the money from one W. D. Mahaney, an officer and employe of the Company. In each count it was alleged that the money was received as compensation for services rendered to the Rialto Grain and Securities Company. The replication charges that the defendant was convicted on the first two counts of the original indictment, that he prosecuted an appeal therefrom, and that the conviction was reversed and a new trial granted.

## DEMURRER TO THE REPLICATION.

The defendant demurred to this replication as insufficient to preclude him from his plea, and it being agreed that the question arising upon the plea and replication was one of law, the Court passed upon it as such, and denied the plea.

## THE TESTIMONY.

Upon the trial of the case the testimony showed the following facts:

### The Brooks Brokerage and Commission Company.

Prior to June, 1902, there existed in St. Louis the Brooks Brokerage and Commission Company, which was owned and controlled by one Charles H. Brooks.

Hugh C. Dennis, familiarly known as Major Dennis, was a resident of St. Louis at the time, and was the General Agent of the Hartford Life Insurance Company for the States of Missouri, Arkansas and Texas.

Dennis, in the month of June, 1902, acquired the interest of Brooks in the Brokerage Company, but committed the conduct of its affairs to one E. C. Walden, who had been Secretary of the Company under the Brooks management, Dennis continuing in his Life Insurance business.

**Brooks' Attacks Upon Dennis.**

About the 27th of July, Mr. Brooks, who was then in California, wired Dennis to the effect that he would take a half interest in the business, back it with credit of $50,000, and add new features. This proposition was declined by Major Dennis, whereupon Brooks immediately came to St. Louis, bringing a lawyer with him, and started a so-called collection agency for the purpose of organizing a fight against Dennis and compelling him to take him back into the company, or to blackmail him out of a large amount of money. This precipitated a series of law suits against Dennis, and to obviate further trouble, Dennis wound up the business of the Brooks Brokerage Company, and organized

**The Rialto Grain and Securities Company.**

about the first of September, 1902. The company was owned by Major Dennis and was organized under the legal direction and advice of Judge Chester H. Krum and Thomas B. Harlan, who were, from the date of its organization and during the entire time here involved and long thereafter, counsel of the company. The purpose of this company was to deal in grain, provisions and securities.

The controversies between Brooks and Dennis brought about an

**Investigation of the Brooks Company.**

by the Federal authorities. Dennis insisted that he was innocent of all wrong, and that whatever was illegal in the

business was the work of Brooks and Walden. He aided the investigation and turned over all the books and papers to the authorities, but as he had been the owner of the concern for a portion of the time, he was apprehensive that an indictment might be found against him, which would be extremely hurtful alike to him and to the Rialto Grain and Securities Company. He prepared therefore to meet the situation. (Rec. pp. 112 and 113.)

## The Employment of Burton.

There was an advertising agency in St. Louis, H. W. Kastor & Sons, which had done business for the Rialto Company, and which had also had some business relations with Senator Burton. The manager of this agency, as an act of friendship to Senator Burton, had recommended him to Major Dennis as a suitable man for counsel in his troubles, and Dennis had directed one of his local attorneys to engage him.

Senator Burton was a total stranger to Major Dennis, and knew nothing of any of the matters before stated until coming to St. Louis on the 17th of November, 1902, when he met Kastor on business of his own, and was told by Kastor that he had a client for him.

Introductions followed, but Senator Burton was about to take the train for Chicago, and Mr. Harlan went with him for the purpose of a conference. The business of the Senator with Kastor not having been concluded, Kastor also went along.

## The Agreement with Harlan.

The conference between Mr. Harlan and Senator Burton respecting the employment of the latter was had on the train in Illinois, between the cities of St. Louis and Chicago.

In this conference, Major Dennis and the Rialto Company were considered as one. The apprehended indictment was

the matter of immediate urgency, and was discussed in its various phases.

With the indictment out of the way, Major Dennis designed to engage in the sale of securities on a popular plan, viz: Having the bonds of railroad and other companies issued in small denominations and taken by persons of modest means. This matter was discussed at great length, and the ability and the opportunities of Senator Burton to aid in its realization through his Eastern acquaintances and connections, were all entered into. It was understood that other matters might arise as to which the advice and assistance of Senator Burton would be desired.

As to compensation, a salary of five hundred dollars per month was suggested, but Senator Burton stated that as the criminal case against Major Dennis would be the first thing to come on, he would not care to engage for that sum if his employment was to cease as soon as that was disposed of, and that the employment should therefore run for at least five months. This was all assented to as reasonable by Mr. Harlan, who added that the employment would not terminate with the five months unless the Senator terminated it. He however could conclude nothing, but would consult Dennis. Nothing was said as to the time of the commencement of the service.

## Scope of the Employment.

The contemplated engagement was talked of and treated as a general engagement as counsel for the Company with special reference to the apprehended indictment, and the popular plan of placing securities.

In connection with the suggestion that the employment of Senator Burton should be as general counsel for the Company, he inquired, in view of the investigation of the Brooks Brokerage Company, whether the Rialto Company had any trouble with the Postal Department. He was as-

sured that it had not, and could not have. That the Company was organized under the direction of Judge Chester H. Krum and Mr. Harlan, and was violating no law, State or Federal, and did not intend to. Senator Burton was explicit that he would accept no employment inconsistent with his position as Senator, that he would try no case before the Department, nor undertake to influence the Department in any way, and that if the Company got into trouble with the Department, he would resign as its counsel. Mr. Harlan in turn gave positive assurance that there would be no trouble of this kind, and that they proposed to meet the Department by keeping on the right side of the law.

The only testimony as to what occurred during this conference on the train is that of Mr. Harlan and Senator Burton, and we have given its substance. (Rec. pp. 126-132 and 230-235.)

### The Agreement Concluded.

Senator Burton went from Chicago to Washington, and Mr. Harlan returned to St. Louis. Harlan conferred with Dennis, and on the 18th sent a telegram to Senator Burton, which is not in evidence. On the same day he wrote a letter, which, among other things confirmed the telegram in the following terms, viz: "I hope you received my message to the effect that this Company accepts your terms to act as counsel at a salary of $500.00 per month, *said services to begin immediately; that is of this date, November 18th,* 1902." Senator Burton responded to this, writing from Washington on the 20th of November: "In return if agreeable you may make remittance for my first month's pay." (Rec. 112-114.)

### The Situation as to Dennis.

Harlan's letter, after confirming the telegraphic message accepting the terms of employment and stating the begin-

ning of the term of service, enters into a resume of the situation as it involved the apprehended indictment of Dennis, and concludes, "I do not know what reports have been sent into the Post Office Department at Washington, nor am I prepared to say that the Government intends to make a case against Major Dennis; but if you can find it convenient to inquire of these facts at the Department, you may be able to perform for us a great service at this time. Should any action be taken here by the Grand Jury, I will wire you at once." (Rec. 112.)

### The Situation as to the Rialto Company.

There had been no suggestion up to this time to Senator Burton that there had been any complaints made against the Rialto Company in the Postal Department, or that the Company was in any manner involved in the Department, and every assurance had been given by Harlan that there would be nothing of the sort. The trouble on account of the Brooks Brokerage Company was existent, and had given rise to Senator Burton's inquiries as to whether the Rialto Company might possibly become involved.

### Houts and Evans Complaints.

As a matter of fact, two complaints had been made against the Rialto Company, one on October 28th by Bella Evans, of Albany, New York, saying that she had sent thirty dollars for investment and had gotten no acknowledgment of receipt, and that the Company had refused to answer her letters. The other was by Mrs. K. C. Houts, on October 30th, charging that the Rialto Company "have swindled me in the sum of $50 sent them. They made false quotations and utterly ignored my instructions and my demands for the return of my money. They utterly refused to answer my letters. They sent a slip of paper

inclosed in one of their letters, stating that if I returned same with remittance they would guarantee me six hundred per cent within ten days on December corn." (Rec. 48-51.)

Senator Burton was not advised of these complaints in his conference with Harlan. He knew nothing of them at all until he called at the Department on November 20th, and then was informed only that these persons had made complaint, without being advised as to the nature of the charge.

These were the only complaints charging actual fraudulent conduct ever made against the Rialto Company up to the time that Burton's connection with it ceased. None had been made before, and none other were made, if ever, until after Burton had terminated his relations with the Company.

## Other Complaints.

There were some other letters sent in subsequently, and prior to March 26th, 1903, but these simply transmitted circulars and booklets of the Company, with the suggestion that a bad business was indicated by them. An example is the letter of Sarah A. Warner, written in January, 1903, in which she says, "the business is not one whit more respectable than the bucket shop, and is more injurious than the latter. I have not been taken in, but as a farmer, one of the most unfortunate classes of American citizens, I wish to protest against the whole gamble in grain and food stuffs, which injures the whole country, us poor farmers first and benefits none." (Rec. 66-67.) Mrs. Warner was decidedly opposed to all speculative dealing, but the defendant was not informed and never knew anything of her protest or of the similar protests of Allen and Fravel.

He knew only that Mrs. Evans and Mrs. Houts had made some kind of complaint, and did not know this until November 20th.

**Action on Houts and Evans Complaints.**

The Houts and Evans letters were sent to the Inspector in charge at St. Louis on November 7th, 1902, in the regular routine course, were received in St. Louis in due course of mail, the complaints investigated by the field inspector on November 14th, and reported by him on that day to the inspector in charge as unwarranted. (Rec. 229.)

The Rialto Company was advised in some way of this report, for when on November 20th the defendant wrote to Harlan, saying he was advised that these parties had made complaints, Harlan, on November 22d answered, saying, "The claims that you referred to against the Rialto Grain and Securities Company, have been investigated by the Post Office Inspector connected with this Department, and he found the actions of our Company to be all right, and we are informed made a report in our favor relative to the same." (Rec. 115.)

**Action on other Complaints.**

The report of the Post Office Department shows that in addition to the letters of Mrs. Houts and Mrs. Evans, there were received letters as follows, up to March 26th, 1903: F. R. Fravel, November 8th, 1902; Arthur M. Allen, January 5th, 1903; S. A. Warner, January 21st, 1903; E. Onlette, January 28th, 1903; Jesse A. Foye, March 10th, 1903; and F. P. Andrews, March 20th, 1903. The next letter was Joseph Steiner, May 7th, 1903; and then follow nineteen letters or complaints at various intervals, to and including April 29th, 1904. The Court below excluded consideration by the jury of everything after March 26th, 1903, when the defendant terminated his relation with the Rialto Grain and Securities Company. (Rec. 97-98.)

The contents of these letters or complaints are shown only as to those by Houts, Evans, Warner, Fravel and Allen.

## Burton's Knowledge of Complaints.

There was no evidence that Burton knew of the existence of these letters, except those of Houts and Evans. His only knowledge of these two letters was that Cochran told him of their existence, but not their contents. Furthermore, the positive evidence on behalf of Burton is that he did not during his employment know of any other letters than those of Houts and Evans.

The evidence shows affirmatively and conclusively that the only officials of the Governmen who knew anything of these letters until after March 26th, 1903, were (1) Blaine W. Taylor, Chief Clerk of the Post Office Department, who opened all mail and sent each piece to the Division or Section to which it belonged; (2) George M. Smith, Clerk in the office of the Chief Inspector, who sent out complaints to the Inspection Divisions respectively to which they pertained; (3) Frank E. Davis, the Chief Clerk of the Inspector in charge of the St. Louis Division, who received and opened the mail for his chief; (4) George A. Dice, the Inspector in charge at St. Louis, who turned the letters over to M. G. Price, the field inspector, for investigation; and (5) M. G. Price, who made the investigation and reported the complaints unwarranted.

## What Burton Did.

All of these officials dealt with these letters in the regular course of their duty, without a word or intimation from anybody in the Department or out of it. Senator Burton never spoke, wrote or hinted anything to any of them. It does not appear that he ever saw one of them or knew that any such person was in being.

The only person he ever spoke to was William E. Cochran, the Chief Inspector, of whom he inquired, as Cochran testifies, on November 20th, whether there were any charges against the Rialto Company, and received the information

that there were two complaints, and the names of the complainants. And Cochran was unable to answer the inquiry without in turn inquiring of his clerk, and then could answer only as to the fact of the complaint and the names of the complainants. He knew nothing beyond the endorsement on the so-called "jacket" of the complaint, and the defendant did not know anything of it and did not assume to, and the merits of the matter were not considered by them or either of them. (Rec. 167 and 8.) At this time the Houts and Evans and Fravel letters had already been sent out to St. Louis, had been examined into and found unwarranted.

Cochran did not interfere in any manner with the orderly course of affairs, and was not asked to do so. His division was charged only with the duty of investigation, and had no authority to issue a fraud order. There is no evidence that the defendant ever talked to any other official or had any one do so, in connection with this matter.

Over the objection of defendant, Cochran testified that "I should have given to any one inquiring, probably, the fact that a case had been made up, but I should not have given to him the names of the complainants." "Why did you give them to him?" "Because he was a Senator of the United States." (Rec. 159-160.)

This was the only thing suggested as having been in fact accomplished by the defendant, and this the Rialto Company already knew, and they knew further what apparently Cochran did not know—that the complaints had been investigated and rejected by the field inspector.

The Government offered evidence to show that on Monday, December 1st, 1902, the defendant called on the Assistant Attorney General of the Post Office Department, but there was nothing to show the object of the call or that it related in any wise to the Rialto Company, and at that time the matter was not before that officer. (Rec. 181-184.)

**Who Prevented Issuance of Fraud Order.**

Complaints came in after March 26th, 1903, and more frequently than before, and in July a thorough investigation was undertaken by Field Inspectors Price and Piatt, beginning with January 1st, 1903, and not again considering the Houts, Evans and Fravel complaints, and they made a written report on August 20th, 1903, substantially to the effect that something done on June 17th, 1903, for which Major Dennis was not responsible, he being at the time away, broken mentally and physically, was the basis for a criminal prosecution against the officers of the company, and concluding, "This report and the evidence are submitted without recommendation for whatever action the Department may see fit to take. As bucket shops that are conducted through the mails exist, it is believed that the Rialto Company has conducted a fairly honest business, with the exception of the deal of June 17th, and we are therefore disposed to accept District Attorney Dyer's advice to recommend no fraud order. For the value that the papers herewith forwarded may be in the case of prosecution, it is recommended that they be returned as soon as they have served their purpose with the Department." This report was forwarded in due course, and coming before Charles H. Robb, Assistant Attorney General for the Post Office Department, he reports that, "in accordance with the recommendation of the inspectors, will close the case without further action by the Department at this time." (Rec. 216-226.) As the record shows, the prosecution of the defendant in the Court below was conducted by District Attorney Dyer and Assistant Attorney General Robb, who both recommended after full investigation that no fraud order issue and no fraud order ever was issued. There was no pretense by any one that the defendant or any one else influenced these officials. The indictment charged the defendant in the first, second, sixth and eighth counts with having undertaken the

service, and in the third and seventh counts, with having rendered it, "of appearing before the said Post Office Department, and before the Said Postmaster General, the Chief Post Office Inspector, and the Assistant Attorney General for said Post Office Department as an agent and attorney for the said corporation, and obtaining information for said corporation concerning said proceeding in this count mentioned, in which the United States was then indirectly interested, and by the influence of his presence and of his office as such Senator, and by statements, representations and persuasions, *inducing the said Postmaster General to believe that the said corporation was not conducting any such scheme to defraud, etc.*" The facts stated in this paragraph of this brief showing that the case was not before the Postmaster General or the Assistant Attorney General for the Post Office Department until months after the defendant's connection with the Rialto Company had ceased, and was then decided, not upon any statements, representations or persuasion of the defendant, but entirely upon the recommendation of those who were prosecuting him, were not permitted to be shown to the jury. (Rec. 215 and 216.)

**Burton's First Visit to Department November 20th, 1902.**

The letter from Harlan to Burton of November 18th, 1902, after confirming the telegram respecting the employment of Burton, deals exclusively with the apprehended indictment of Dennis on account of Brooks Brokerage Company matters. There is not a word in it concerning the affairs of the Rialto Company. It asks the defendant to ascertain, if he can, the intention of the Government respecting this indictment, and it asks nothing more by remotest hint or intimation. (Rec. 112-113.)

Pursuant to this letter, Burton called on Cochran, and

on no one else. The only witnesses to the interview were Burton and Cochran, and the only evidence other than their testimony, respecting it, is Burton's letter of November 20th.

Cochran on direct examination (Rec. 159-160) testified that Burton asked if "any complaints had been received, or any investigation was under way with reference to the Rialto Grain and Securities Company, and I secured the information and gave it to him. * * * I told him that there was such a case, and gave him the names of the complainants on whose complaint the case was jacketed. * * There was a general discussion as to the business of the Company, the Senator telling me that the Rialto Company was endeavoring to do a straight business, and that any trouble they might be in was trouble about the old company, and that the new company was all right."

Being asked whether this was all that was said at the time about the matter he answered, "That was the substance of it, I think." (Rec. 160.)

On cross examination (Rec. 166-168) the additional matter was that the prospective indictment against Dennis may have been talked about then—it was either then or afterwards. At this time Cochran had no knowledge of the nature of the complaints by Houts and Evans, and there was no discussion of the subject matter of them. Burton did not assume to know anything of them, and neither did Cochran. Neither of them discussed any such thing as a fraud order, and never did. Burton never requested that no fraud order be issued. The witness testified also that Burton repeatedly said that he did not wish to antagonize the Department in any way and would not contend for his view of the case even if he was satisfied the Department was wrong. This, however, was not said specifically of the first interview.

On redirect examination (Rec. 175) Cochran said he had no right to issue fraud orders, and any request that might

be made to withhold fraud orders would not ordinarily be made of him. His division simply made investigation and reported the facts to the Assistant Attorney General, and if a fraud order was issued at all, it was first considered by the Assistant Attorney General and submitted by him to the Postmaster General for action, and if a request for a hearing was made, it should go to the Assistant Attorney General.

Burton testified on direct examination (Rec. 235-236) that he inquired as to the proposed indictment of Dennis, and was told that the matter, so far as the Department was concerned, was with Dice, the Inspector in charge at St. Louis. He then asked Cochran what he knew about the other Company, and Cochran answered that he knew nothing. Burton then inquired whether there were any complaints against it. Cochran examined the records and answered that there were two filed in the latter part of October or first of November, and that they had been sent out to St. Louis on November 7th. Burton said further, "Mr. Cochran, my understanding is that the trouble as to Major Dennis grew out of his connection with the Brooks Company; that has suspended; and I have been led to believe by the local attorney of the Company that this Company is all right, but I don't know. They are strange to me. And if there are any complaints filed here against the Company, or anything that puts you upon inquiry I wish you would let me know, unless there is some reason why you should not." Burton then asked about the custom, and Cochran said it was always the custom to grant a hearing to parties against whom complaints were filed, unless it was a very aggravated case. Burton said, "If anything comes to you that requires summary action, of course I don't ask to be advised." I said to him that whereas I was attorney of the Company, I was not its attorney there, and under no circumstances could I be employed as the attorney in the Department. I think that was about all of the conversation."

On cross-examination he testified:

"Q. When you went down to see Mr. Cochran on the 20th of November, 1902, you had in your mind, you say, the matter of Dennis' threatened indictment for his connection with the Brooks Brokerage Company; is that true? A. Yes, sir.

Q. How did it become important, if it did so become, for you to ask at that time if there were any complaints against the Rialto Grain and Securities Company? A. Well, I had been employed by the Company, and Mr. Dennis was a stranger to me, and so was Mr. Harlan. And Mr. Dennis was threatened with trouble because of his connection with the Brooks Company, and I wanted to know that the assurances that Harlan had given me were true.

Q. Then at that time you were informed that complaints had been made against the Rialto Grain and Securities Company, and these complaints had been by Mr. Cochran forwarded to George A. Dice, Post Office Inspector in charge in St. Louis for examination and report, were you not? A. I was informed as to these two complaints that they had been sent out here for examination.

Q. And then, being so informed, what gave rise to your saying in substance, in your letter to Harlan, 'All such complaints must be taken care of, especially until we get out of the Brooks matter?' A. Why, the reason—You ask me the reason for that expression in the letter?

Q. Yes. A. I do not have any independent recollection of dictating the letter, but I take it that the reason was, that the indictment of Dennis being made public, and Dennis owning the Rialto Grain and Securities Company—in fact, I never disassociated the two; when I thought of the Rialto Grain and Securities Company I thought of Dennis; and when I thought of Dennis I thought of the Rialto Grain and Securities Company—would naturally cause more or less excitement, and complaints might be sent in; and my advice to him was to take care of it." (Rec. 244-245.)

* * * * *

Q. When you went to the Post Office Department to see Mr. Cochran on the first occasion of your visit, to-wit, on the 20th day of November, 1902, did you say to Mr. Cochran that the Rialto Grain and Securities Company was all right? A. I don't know that I said it just in that way. I told him, I think this: my information is that the trouble between Dennis and the Government grew out of his relation with the Brooks Brokerage Company, and that I had been advised by the local counsel, who had employed me, that the other company was all right; and I also explained to him, however, that I was a stranger, and that I did not know them.

Q. Did you tell Mr. Cochran in that conversation at all that you had been employed by Harlan or by the local attorney? A. I told him first that if he intended to indict Dennis I expected to help defend him. And I told him that I was the attorney of the Company, but not the attorney here; but as I said a while ago, I never disassociated Dennis and the Company, so far as that, as Dennis owned the Company.

Q. I am not asking you what you disassociated. I am asking you whether at that time you said to Mr. Cochran, 'The Rialto Grain and Securities Company is all right?' A. I may have used that language, Colonel, in the connection in which I told you.

Q. Did you say to him at all that you had been employed by the local counsel? A. I didn't know that I said by local counsel. I think I said to him that I was assured by the local counsel, who employed me. I said to him these parties are strangers to me, and I don't know. (Rec. 247-248.)

* * * * *

Q. I will read you from your testimony given before: In speaking about your interview with Mr. Cochran, I ask you whether this question was asked you, and whether this answer was given by you: 'Q. Right there, Senator, what was your purpose in making that inquiry of Cochran in reference to any complaints concerning the Rialto Grain and Securities Company; state to the jury what your purpose in that re-

spect was?' 'A. I had been employed as counsel for the Company. That I had this letter from Mr. Harlan, referring to letter of November 18th), telling me that the tentative employment he had made with me had been ratified by the Company. I had been advised that Major Dennis had had trouble with the Brooks Brokerage Company. As I say, I went there to ask about that. Both Mr. Kastor and Mr. Harlan had assured me that whatever irregularities there were in that Company, it was not the fault of Major Dennis. I knew Judge Krum and Mr. Harlan were the attorneys of this Company, but, being advised that far, I went to satisfy myself with respect to the standing of this Company in the Department. That was the motive of the inquiry.' Was that question asked you and did you answer it in that way? A. That question was asked me, and I answered it in that way, I think.

Q. Was there anything said in your conversation with Mr. Cochran on that occasion, about a criminal prosecution against Dennis? A. Yes, sir." (Rec. 250.)

Cochran was called to the witness stand in rebuttal, but was not asked anything as to this interview.

Pursuant to this interview Burton on the same day wrote to Harlan (Rec. p. 114) as follows, viz:

"November 20, 1902.

Mr. Thomas B. Harlan, Rialto Grain and Securities Company, St. Louis, Mo.

Dear Sir: Your favor of November 18th received. I called at the Department this morning and find that there are two complaints lodged against your Company. One by Bella Evans and the other by Mrs. K. C. Houts, both of Albany, New York. These complaints were sent out from the main office here for investigation on the 7th of November, and doubtless the Inspector there has called your attention to them before now. If he has not, he will do so very soon.

I should like to be advised what there is in these complaints. Without knowing anything about the merits of the same, I would advise that all complaints

receive special attention by your Company, and if possible satisfy the complaints, especially should this be your motto until after this Brooks matter is entirely out of the way.

I have arranged with the Department to be advised in case any complaints are made against your Company, and have arranged for a hearing if any hearing should become necessary. I have assured the Department that it is the purpose of your Company to comply strictly with the law, and that it is your desire to remain at all times in perfect harmony with the Department.

No action of any kind will be taken against you without my first being notified, and every opportunity for full explanation or hearing will be had.

In return, if agreeable, you may make remittance for my first month's pay.

Faithfully yours,

J. R. BURTON."

This was all the evidence as to the first interview and the first letter. There is no evidence and no suggestion that when Burton wrote this letter he had seen any official save Cochran or that he had said anything or done anything save what he said or did in the interview of that day with Cochran.

Burton's letter was answered by Harlan on November 22d, and so far as relates to this matter states, "The claims that you referred to against the Rialto Grain and Securities Company have been investigated by the Post Office Inspector connected with this Department, and he found the actions of our Company to be all right, and we are informed, made a report in favor of our Company relative to the same." (Rec. 115.)

And this is the end and all there is of Houts and Evans in this case so far as concerns Senator Burton.

## Conference of Harlan and Burton in Washington.

On the 26th of November, Harlan was in Washington and conferred with Burton concerning the prospective indictment of Dennis. They did not go about the Department and the Houts and Evans complaints were not mentioned.

Harlan returned to St. Louis on Saturday night, the 29th of November, and found that Dennis had been indicted, and arrested, and had given bond, and wired Burton that night accordingly.

## The Indictment of Dennis.

On the 2nd of December he wrote at length to Burton on the subject, and as to its effect on the Company and business. The fact of the indictment has been telegraphed abroad and the day's mail has brought in several letters, threatening in their nature. He states what they will do with complaints. "We will be able to meet each one of these cases individually, and show the Post Office Department a clean record. * * * Locally, I believe we will be able to control the situation, as this business has been pretty thoroughly gone over by the Inspectors and they understand just what we are doing, and how we are doing it. At your end of the line, you will of course, use your own judgment in handling the situation. We will at all times be glad to observe any request made by the Post Office Department or to submit to any examination that they may direct.

The cases here are set for trial on the 6th of January, and Judge Krum and I are preparing now for trial. We will get all the evidence in shape; I will thoroughly brief the law pertaining to the cases, and when we have got matters worked out, we will submit the whole case to you for your

consideration, and would certainly much appreciate it if you could find it convenient to be here to participate in the defense." (Rec. 116-117.)

**Supposed Interview with General Tyner.**

To show that Burton did something at "his end of the line" the Government introduced Paul B. Kaiser, who testified that on Monday, December 1st, 1902, at from five to ten minutes before nine o'clock in the morning, Burton came to the office of the Assistant Attorney General for the Post Office Department and asked, first for the head of the Department, and then for a man who occupied a desk to which he pointed. While this was going on, the desk occupant, Mr. Hubner, came in. (Rec. 181.)

Mr. Hubner testified presumptively with respect to the same incident, but not so explicitly in respect of date as did Kaiser, that Burton asked for General Tyner, who came in about half an hour, and that Burton was with General Tyner for about half an hour. What the interview was about, he did not know.

The defendant moved to strike out this testimony, but the motion was overruled. (Rec. 183-184.)

The defendant testified that he had no recollection of ever meeting General Tyner in his office, and he did not call on him in consequence of any communication from Harlan. (Rec. 248.)

The telegram from Harlan was sent late on the 29th of November, and simply gave information as to the indictment. The letter was written on December 2d, and would not reach Washington until the 4th.

There was no reply of any kind by Burton to either telegram or letter, and no report at any time of any visit to anybody in connection with either letter or telegram.

Every visit shown to have been made by Burton to the Department was a visit to Cochran, the Chief Inspector,

and every visit save the third, when he was accompanied by Dennis, is evidenced by letter or telegram to somebody.

The evidence of Kaiser and Hubner was submitted to show visits to and efforts to influence the Assistant Attorney General for the Post Office Department. It is to be remarked that the Rialto Company matter was not before this official at this time and did not come before him until Burton had long ceased connection with the Company, nor until there had been a change in the incumbency of the office itself.

## Second Visit of Burton to the Department, December 9th, 1902.

On December 3d, Harlan wrote to Burton, advising him that two men, Bowman and Shove, were representing themselves to be Post Office Inspectors, and were undertaking to secure some advantages with the Company in settlement of accounts, by threatened use of their official positions. Harlan is of opinion these men are not Inspectors, but if they are it would seem that there was an effort to catch the Company in a trap. "This they cannot do by any honest methods, nor is the matter one of much consequence, except we would like to know if we are being investigated in this manner. I call attention to it merely as a matter for your information. I have just returned from a consultation with Judge Krum. He had a copy of the indictment and we considered the same and both feel that the case gainst Dennis and Garland will be taken from the jury. Up to the present time, I have found no authority to sustain the Government's position, nor do I see how they can make a case against either Dennis or Garland. Today's mails have brought in a number of letters enclosing newspaper clippings, but most of the letters are very fair, and if the situation gets no worse than it now appears, the Rialto Company will have but little trouble in getting through with the situation. Will keep you fully informed. Yours very truly, —— —— P. S.—

Bowman represented that he was connected with Philadelphia office." (Rec. 118.)

On December 9th Burton called on Cochran and inquired if Bowman and Shove were Inspectors.

Cochran testified (Rec. 160) that Burton called and made the inquiry as to these men and received the information that they were not Inspectors. He cannot recall definitely whether at this time he said the Rialto Company was intending to do an honest business and keep out of trouble. This statement was made at different times.

Burton testified (Rec. 236) that he simply inquired as to Bowman and Shove, was informed there were no such inspectors, that they had violated the law in representing themselves to be inspectors, and that there was nothing in it, and that no instructions had gone out from the Inspector's office at all, or something of that kind. The Inspector said he would like to catch these fellows.

On this same day (Rec. 119) Burton wrote to Harlan:

"December 9th, 1902.

Mr. Thomas B. Harlan, St. Louis, Mo.

My Dear Harlan: There is no man by the name of J. H. Bowman who is a Post Office Inspector. This man Bowman in impersonating a Post Office Inspector, violated the Statutes, and laid himself liable to punishment. The man operating in Colorado Springs was also a fraud. There has gone from this office no instructions whatever about the Rialto Company, and there is nothing in this office against you at this time. The matter in St. Louis, as you know, is in the hands of Mr. Dice there. I herewith return the letter.

I would suggest that you prepare carefully the case of Dennis for early next month, and I have learned to know that you must watch carefully that the jury is not set up on you. By the way: can you get a fair trial before Adams. These are all important questions that you must carefully consider. I will take care of things at this end of the line. Please keep me constantly advised. Faithfully yours,

J. R. Burton."

This is all of the evidence as to the second interview. It shows everything that was said or done by Burton. Not one word was said about the issuance of a fraud order; what complaints had been made had been sent out to St. Louis and were in the charge of inspectors there. Nobody had complained of being injured in any way save Mrs. Houts and Mrs. Evans, and their complaints had been investigated and reported upon as unfounded. Nothing was being done at Washington, and nothing was being done at St. Louis, and there is not a scintilla of evidence that this was due to any interference by Burton in Washington, or indeed by anybody anywhere.

## Third Visit to Department, December 15th, 1904.

The third visit of Burton to the Department was on December 15th, 1902.

It is proper to observe in this connection that the Houts and Evans letters were sent out to St. Louis on November 7th. The letter of Fravel was sent out on November 8th. No other letter of complaint or charge against the Rialto Company or of information concerning it came in thereafter until January 5th, 1903, when Allen sent in a letter of information.

Inspector Price had investigated on November 14th, and reported to his superior, Dice, that there was no warrant for the complaints. There was no motive for nor incitement to further action by any official of the Government until some further charge was made, and what had been done before this time, was done before Burton was employed.

On December 15th Dennis had been indicted and was in Washington to confer with Burton respecting it, and this indictment was not merely the chief, but it was the only action of the Government pending of which Dennis or Burton had any knowledge and in which they had any concern.

Under these circumstances Burton called with Dennis at the Department.

Respecting this interview Cochran testified:

"Q. When, if at all, did you see him after—if you saw him again after the time he made the inquiry of you about the Post Office Inspectors. When, after that, if at all, did you see him? A. I think it was when he brought Major Dennis to my office and introduced him to me.

Q. Do you recall now about the time when that was? A. Why, it was after the indictment of the officers of the Brooks Brokerage and Commission Company, and, to the best of my recollection, was early in December, 1902.

Q. State what took place at that time when he came there with Dennis. A. The Senator said he wanted me to meet Major Dennis, and to see what kind of a man he was, and he also repeated the assurance that the Rialto Grain and Securities Company was endeavoring to do a straight business, and that all of the trouble with the Company was chargeable to Brooks.

Q. Did anything further take place there at that particular time that you can now recollect? A. I can't state certainly whether or not he said at this time that he would never antagonize the Department, but would try to establish a harmonious relation between the Department and the person he was interested in. He did make that statement on several occasions. I can't say, as a matter of fact, whether he said this on this occasion or not." (Rec. 160-161.)

On cross examination he testified:

"Q. Now, Mr. Cochran, the third visit, as I understand, was on December the fifteenth; and again I don't ask you to affirm that date? A. Yes, sir.

Q. But I think these are fixed correctly? A. Yes, sir.

Q. And that was the time when he called with Major Dennis? A. That was the time.

Q. He called at your office and he introduced him, and you knew at that time that there was an indictment pending against Major Dennis? A. I did.

Q. And Mr. Burton came there and introduced his client? A. He did, yes, sir.

Q. You understood that he would be counsel for Major Dennis, is not that it? A. No, I didn't, at that time, Mr. Lehmann, he did not distinctly state so at that time.

Q. Well, he introduced him, and said he wanted you to see the manner of man he was? A. Yes, sir.

Q. And you knew that the case was pending? A. Yes, sir.

Q. And there was allusion to that, was there not? A. To the case?

Q. Yes. A. I think there was.

Q. So that, the case against Dennis was talked about? A. Yes, sir.

Q. Now, at that time, he said nothing whatever about the issuance of a fraud order, did he? A. I think not." (Rec. 169.)

Burton testified as to this:

"Q. Coming again to the visit of Major Dennis. I believe you said he came down there to Washington? A. Yes, sir.

Q. State what occurred? A. I spent an evening with him in examining the indictment and the statement of facts, and that was all that evening, as I remember. The next morning I gave him my opinion about them.

Q. What further transpired? A. When I was ready to leave the hotel—he was stopping at the Willard—he called a carriage and we got in, and drove out the Avenue to my office in the Maltby Building; should say a distance of three-quarters of a mile. And as he was going away, he said he wanted to make a draft, that he wanted some money; and as he wanted more than I had I said, 'I will have to go to the bank with you.' So we got back into the carriage and retraced our steps going up the Avenue, and as we approached the Post Office Building, he made some inquiry as to what building it was, and I told him it was the Post Office Building. And I don't know, but my recollection is that I suggested that we get out and call upon the Fourth Assistant Attorney General, Mr.

Bristow. He was from my state. I think something was said that he had not seen the building, or something of that sort. We got out, and went into the building, went in the elevator to the fifth floor, and went into the office; but Mr. Bristow was not in. We waited a moment or two, and then we came out. And passing the stairway—there is an unique iron stairway right in the corner—he made some remark about it and we were looking at it. I said, 'Major, we can step down this stairway and take the elevator on the next floor.' We walked down to the next floor, and passed Mr. Cochran's room. He was sitting at his desk facing the door. I said, 'Let us step in, Major, and I will introduce you to Mr. Cochran.' We stepped in, and I introduced them. I said, I think, 'Mr. Cochran, here is the man you indicted in St. Louis, and I want you to see what a pleasant looking man it is you have indicted.' They then began to talk about family names, or something, and Mr. Dennis said his middle name was Cochran, Hugh Cochran Dennis. They talked a moment about where they were from and so on, and then we got up and left." (Rec. 237-238.)

On cross examination he was not questioned directly as to the matter, but rather as to his testimony concerning it on the former trial, as follows, viz.:

Q. Was there anything said in your conversation with Mr. Cochran on that occasion, about a criminal prosecution against Dennis? A. Yes, sir.

Q. In your testimony before, was this question asked you? 'Question: Did you go to his office? Answer: I went to his office. He was not in. We waited a few minutes, and then we left his office and went down the winding stairway there. I suggested that we go down that way and make a call at Mr. Cochran's office. Question: What occurred at Mr. Cochran's office? Answer: I think it is about as he told it.' Did you give that answer then? A. I probably did give it just that way. At least, that is substantially true. The only difference is, that my recollection is that it was not mentioned calling on Mr.

Cochran until we were passing the door, but I might have suggested it before we went down the stairway.

Q. That is only one flight down? A. Yes, sir, only one flight.

Q. Was this question asked you, 'Question: Your recollection as to what occurred is substantially what Mr. Cochran indicated? Answer: Well, sir, I don't remember anything different, unless it was, unless I said to him something about being Major Dennis' attorney.' Did you so testify? A. I think I did. Yes, sir. At least, I take the record for it. I don't remember the words.

Q. My attention is called to the fact that there is one question I omitted. This is the question I omitted: Was this question asked you and did you answer it as here? 'Question: You introduced Major Dennis to him? Answer: Yes, I introduced Dennis and I heard some talk there about Dennis' middle name being Cochran, and they talked about family matters.' Did you answer that? A. Yes, sir, I think I did. At least, I think that is true.

Q. Did you in the testimony you gave at that time, as you now recollect it, mention in that testimony a criminal prosecution against Major Dennis? A. I don't know that I used the word 'criminal,' but I had this letter here and I inquired whether it was his purpose to prosecute Dennis. I don't remember the words.

Q. I know what you have said here. I want to know whether or not, when you testified before, you testified then to what you have now said, as having reference to the prosecution of Dennis? A. I think I did, Colonel; I think I said something about it. I don't remember just the words. You can consult the record. I think I said I asked him, and I think he said he didn't know." (Rec. 250-251.)

The re-direct examination was:

"Q. Mr. Burton, I call your attention to your former testimony respecting that interview with Mr. Cochran, when Mr. Dennis was there; you were asked, very generally, 'your recollection of what occurred is

substantially as Mr. Cochran indicated?' Your answer was, 'Well, I don't remember anything different, unless it was, unless I said to him something about being Major Dennis' attorney.' You so testified? A. Yes, sir, I think I did.

MR. LEHMANN: I simply wished to bring in the context of what they inquired about.

Q. Was this question asked you: 'Question: Unless it is materially different, it is not necessary? Answer: As he gave it, it is substantially correct. Question: On that occasion, Senator, did you ever have any other purpose in going to Mr. Cochran's office than merely to present Major Dennis? Answer: No, sir, we were driving back from my office to the bank.' Did you so testify? A. Yes, sir, I did.

MR. LEHMANN: This is all I observe on this subject, although there may be more." (Rec. 251-252.)

**The Fourth Visit on January 24th, 1903.**

On January 24th the only change in the situation as to the Rialto Company in the Department was that Allen and Mrs. Warner had sent in their letters and these had been forwarded to St. Louis, Allen's on January 5th and Mrs. Warner's on January 21st. These were letters of information, enclosing literature sent out by the Rialto Company. Mrs. Warner's letter was in censure of all speculative dealing in grain as being mere gambling. The letters were forwarded by clerks as a matter of routine. Nothing was done concerning them in St. Louis, and this because the inspectors saw in them nothing calling for action. There is not a particle of evidence that anything was done by anybody anywhere to prevent investigation. Dice, the inspector in charge, continued in office without reproach until his death. Price, the field inspector, was in office at the time of this trial. Burton did not know of the existence of these letters. Cochran did not know they were in existence. So far as

any knowledge or belief of Burton or Cochran goes, there were no complaints against the Rialto Company, the Department had no concern of any kind with that Company, *with one important exception as to Cochran,* which we shall note presently.

The indictment against Dennis had been tried, and he had been acquitted by direction of the court. Books and records of the Brooks Brokerage Company, which Dennis had turned over to the inspectors to facilitate their investigations which led up to the indictment of Dennis and others, when the trial was over, had been turned over to State authorities. This was complained of as a breach of faith. Dennis wanted the books returned, and Burton called to see about it.

The exception as to Cochran noted above is *that either at this time, or in his recollection of matters thereafter, he had confused the Rialto Company with the Brooks Company, and supposed these books and records to belong to the Rialto Company, and so concluded that Burton was representing the Rialto Company, and was acting in the Department as the attorney of that Company.* (Rec. 170.) He did not become aware of his error until after the first trial, and his testimony is clouded and colored by it throughout.

Cochran testified (Rec. 161 and 162):

> "It was on the twenty-fourth of January, 1903. It was on the—I find that I was mistaken on that—it was on the twenty-third of January, 1903. This was after the case against the officers of the Brooks Brokerage and Commission Company had been dismissed in the United States Court, and the Senator stated to me that, during the progress of this investigation, a book, which I understand now was a record of that Company, but which I supposed at the time was of the Rialto Grain and Securities Company, had been turned over to the inspectors, and that Mr. Dice had, after this trial was concluded, and there was no case pending in the United States Court, turned it over to the Circuit Court, or the Circuit Attorney of this City for prosecution in the State courts. The Senator said that that was a breach

of faith, and insisted that I should direct Mr. Dice to recover the book and to return it back to the persons from whom he secured it.

Q. Well? A. I didn't see my way clear to take that action, and suggested to him, that if he wished I would submit the matter to my immediate superior the Fourth Assistant Postmaster General. This was done, and the same statement was made there, but he also declined to issue the order which was desired.

Q. When the statement was made, and submitted, were you with him at the Fourth Assistant Postmaster General's office? A. I was.

Q. Now, state to the Court, what occurred before the Fourth Assistant Postmaster General, as near as you can, when you went with this defendant there? A. There were practically the same statements made before him that were made to me.

Q. Then what did the Fourth Assistant Postmaster General do with reference to it? A. He also declined to issue the order, and my recollection is, that all three went to the Postmaster General, but the Fourth Assistant and myself, I know, went there, and the matter was stated to him, and by his direction a telegram was sent to Mr. Dice by me.

Q. On what day was that telegram sent by you, by direction of the Postmaster General? A. My record shows it was on the twenty-third of January, 1904.

Counsel for defendant: Do you mean 1903? A. 1903, that is right.

Q. Do you recollect what time of the day this visit was made to you, and to the Fourth Assistant Postmaster General, and to the Postmaster General? A. I should say it was in the forenoon.

Q. Have you stated all that occurred there at that time, upon that visit, as near as you now recollect it? A. Everything except the telegram that I sent.

Q. Yes. A. (Continuing) As I recall it.

Q. Now, after his submitting the case to you, and then to the Fourth Assistant Postmaster General, and finally submitting it to the Postmaster General himself,

what action was taken with reference to that matter; and state whether you, in accordance with the directions of the Postmaster General sent any message to Mr. Dice? A. There is a statement that I will ask permission to make. I find I made a mistake. I mistook one of these telegrams for another, and gave the wrong date for the message that was sent by direction of the Postmaster General. It was on the twenty-fourth, instead of on the twenty-third. I sent another telegram to Mr. Dice on the twenty-third, that I find here, and I mistook it to be that one.

Q. Well, you may read the dispatch you were directed to send Mr. Dice, after this visit of Mr. Burton to these offices. A. 'January twenty-fourth, 1903, Dice Post Office Inspector in charge St. Louis, Mo. Representations are made to Department concerning Dennis case that to surrender certain papers voluntarily placed in your hands for a spe (fici-) purpose would be a breach of faith. Please advise me. Cochran, Chief Inspector.'

Q. What representations do you have reference to in your dispatch to Dice? A. The representations made by Senator Burton."

On cross examination he testified (Rec. 169-172):

"Q. Now, the fourth visit was on January the twenty-fourth? A. The twenty-fourth.

Q. That date you fixed yourself? A. Yes, sir.

Q. And that was entirely with respect to the books of the Brooks Brokerage Company? A. Yes, sir.

Q. And, I believe you stated in your direct examination, that, at that time you had not understood, or did not understand, that they were the Brooks Company's books, but were acting with the view that they were the books of the Rialto Grain and Securities Company? A. I supposed that they were, at that time.

Q. Now, when did you ascertain that they were in fact not the Rialto Company's books but those of the Brooks Brokerage Company? A. It was not until the other trial of this case.

Q. So that, up until that time, you had been under the impression that when Mr. Burton called at your

office on this occasion of January 24th, he was calling in behalf of the Rialto Grain and Securities Company? A. Yes, sir.

Q. Now, all his conversation at that time was with reference to the Brooks Company's books, was it not—that was his business? A. That was his business.

Q. And whatever other conversation was had clustered around that in some way? A. Yes, sir.

Q. And grew out of the discussion of the Brooks Company's books? A. Yes, sir.

Q. He stated to you that those books—whether there was one or more—I have not yet determined—had been voluntarily given by Dennis to the authorities of the United States? A. He said they had been voluntarily given. I don't remember that he stated by whom or not, but that statement was made.

Q. I think you will recall, will you not, Mr. Cochran, that it had been in connection with the Dennis indictment that they had been given? A. Oh, yes, it was.

Q. And having been voluntarily given, why, it meant that Dennis who was the defendant in that case had voluntarily given the books to the Government? A. Yes, sir.

Q. And the statements and representations he made to you at that time were that those books, having been voluntarily given by Dennis to the authorities of the United States, and having been used to the full extent for the purposes of the United States, good faith required that they should be returned to Mr. Dennis before any other use was made of them by other parties. That was the substance of it? A. That was the substance of it.

Q. Those are the statements and representations that you referred to in your examination in chief, which you say were substantially repeated when you and Mr. Burton went to see Mr. Bristow at the Fourth Assistant Postmaster General? A. Yes, sir.

Q. You had declined to interfere, and Mr. Bristow declined, and thereupon you all went to the Postmaster General? A. Yes, sir.

Q. And the statements and representations which I have rehearsed here were in substance repeated by Mr. Burton to the Postmaster General? A. They were repeated. I stated, you know, that I wasn't as positive about his presence there as I was about that of Mr. Burton and myself.

Q. Well, we will treat that as immaterial matter? A. Yes.

Q. That is to say, you neither include or exclude him in the matter as I understand? A. Yes, sir.

Q. He may have been there and he may have not? A. My impression was that he was there.

Q. Yes, well that is why I included it? A. Yes, sir.

Q. But feeling that that is immaterial now; these statements and representations were substantially repeated if not by him, then, either by you or Mr. Burton, to the Postmaster General? A. Yes, sir.

Q. And the Postmaster General directed a telegram of inquiry, which you have referred to, to be sent? A. Yes, sir.

Q. In that interview, from its beginning in your office, its continuation in the office of Mr. Bristow, and its ending in the office of the Postmaster General, there was nothing whatever said about a fraud order, was there? A. No, sir."

Burton testified on direct examination (Rec. 238):

"Q. When did you next see Mr. Cochran? A. I can only fix the date by the letters as he does, and that was on the twenty-fourth of January, I think.

Q. What was the occasion of your calling there? What was the subject matter? A. I had received either a letter or a telegram—I have forgotten now which; and I don't know whether they are in or not. At any rate, I had received word from Mr. Harlan that the books of the Brooks Brokerage Company that Major Dennis had turned over—voluntarily turned over—to the Government or to Mr. Dice, to be used in the trial against him, were about to be turned over by him to the State authorities. I went down there and

talked with Mr. Cochran about it and I told him I did not know anything about it except the word I got. That if the Government wanted to keep the books I had no objection, and certainly would not make any. But if they were through with the books they ought in good faith turn them back to Major Dennis and not turn them over to the State authorities. He seemed to be in doubt about what to do about it, and my recollection is we went up to Mr. Bristow's room and Mr. Bristow seemed to be in doubt, and they two left and went to the Postmaster General. I don't think I went with them. At any rate, both of them said to me that the matter would be inquired about.

Q. That was the only thing, that was the sole and entire subject matter of your visit there? A. Yes, sir."

There was no cross examination.

## The Fifth and last Interview with Cochran, February 5th, 1903.

On February 5th, 1903, the situation as to the Rialto Company remained unchanged, save that a letter had been sent in, which in regular routine had on January 28th been sent out to St. Louis. Neither Cochran nor Burton knew of the existence of this letter. But the books of the Brooks Brokerage Company had not been turned back to Dennis.

The interview of February 5th was at Burton's office in the Senate Annex. Cochran was asked to come there by Burton's Secretary, Colonel Smith. Cochran testified: (Rec. 163-164):

"The Senator told me that he had received a message from a Mr. Harlan in St. Louis—possibly showed it to me—but, any way, he told me that he had, and that he objected to the books being left with the Circuit Attorney here. He said that Mr. Harlan stated that the United States Attorney said he had no further use for the books, and insisted that they should be returned. I told him that I told him what I told him in the other

case and overlooked that the people in St. Louis should take the matter up with the United States Attorney if they wanted to recover the book, and that the Post Office Inspectors here would be governed entirely by such instructions as he might give, but I promised at this time to send a telegram of inquiry to Mr. Dice, and I did send one the next morning.

Q. Well, have you got a copy of that? A. Yes, sir.

Q. The dispatch that you sent to Dice in pursuance of this visit, this conversation you had with him, on the fifth of February? A. I may have stated that was the fifth of March.

Q. Sir? A. I may possibly have stated that was the fifth of March in my other, time, but I didn't intend to.

Q. Well, it was the fifth of February? A. Yes, the fifth of February.

Q. All right. A. 'February 6th, 1903, Dice, Post Office Inspector in charge St. Louis, Mo. Harlan attorney for Dennis, wires Senator Burton that you have surrendered books to State authorities, and that they are held subject to your order; also states that the United States Attorney says he has no further use for them. Please report fully all facts with your recommendation. Cochran, Chief Inspector.'

Q. Was that dispatch sent to Mr. Dice as a result of the interview that you had with the defendant? A. It was.

Q. Was there anything else said in that interview between Senator Burton and yourself with reference to his appearing before the Department? A. There was.

The business in hand, however, had been concluded. What followed in conversation was by way of retrospect, and is reserved for a separate paragraph.

On cross examination he testified: (Rec. 171-172.)

"Q. Now then, the fifth visit, being the last one which he ever made to you until after the indictment

was returned, was also with respect to the books of the Brooks Brokerage Company? A. Yes, sir.

Q. And it was because the books had not yet been turned back and he was making a complaint of that? A. Yes, sir.

Q. That the books belonged to Mr. Dennis, and good faith required that they should be returned to him if the Government was through with them? A. Yes, sir.

Q. And he insisted that the Government was necessarily through with them because the case against Dennis had come to an end? A. Yes, and the statement was also made that the United States Attorney said that he had no use for them.

Q. Yes. A. Yes, sir.

Q. Now, all that there was now, in that interview, from beginning to end, there was no talk about the issuance of any fraud order? A. No, sir.

Q. But you were formerly of the opinion that all those two efforts there to get the books, had relation to the business of the Rialto Grain and Securities Company? A. Yes, sir.

Q. And therefore, you testified on the former trial, that he said he wanted to appear in other matters as he had in the Rialto Company matter; but you are now advised that that was a matter with Mr. Dennis in reference to the Brooks Company's books, are you not? A. I am afraid not, Mr. Lehmann.

Q. The two last visits? A. That was not my understanding exactly.

Q. Well how about—you understood at that time that the books were the Rialto Company's books? A. Yes, sir.

Q. And you are now advised otherwise? A. Yes, but the discussion was a discussion relating to the Rialto Company.

Q. On the fourth visit? A. Yes, sir.

Q. I understood you to say that the only thing talked about was the books? A. I know, but the Rialto Company was what was in my mind at that time.

Q. What was in your mind? A. Yes, sir.

Q. . Yes. But now you understand that that is an incorrect impression? A. Well, that is possibly a matter of opinion. I don't know whether it is or not.

Q. Now, and on the subject of business of the fifth interview, that was about the Brooks Brokerage Company's books again? A. Yes, sir.

Q. Now, Mr. Cochran, the only time that you ever gave Mr. Burton any information with respect to any complaints against the Rialto Grain and Securities Company was the one time on November the twentieth when you told him there were complaints of Bella Evans and Mrs. Hout, which had been sent out? A. I think so; of course, I told him about the inspectors that he inquired about, whether they were investigating that cause or not?

Q. Yes, but I mean about any claim? A. Yes, sir."

As to this interview Burton testified: (Rec. 238-239.)

"Q. When did you next see Mr. Cochran? A. I fix the date again in the same way. It was February 5th. I got a telegram from Mr. Harlan that Mr. Dice had turned over the books and papers to the state authorities; and I had asked my secretary (I think I got it during sessions of the Senate) and I think I asked my secretary to ask him to come in the evening, or the late afternoon, just before dinner. He came there and I showed him the telegram, and he expressed surprise at that part of the telegram which said, 'Colonel Dyer says I have no further use for the books.' I said, 'Mr. Cochran, you have all the information I have about this, and I think if the Government is through with these books they ought to turn them back to Major Dennis.' He said, 'I think so too.' That was all there was on that subject.

There was no cross examination as to this.

The matter of the Brooks books was apparently adjusted in a few days, for Harlan telegraphs to Burton, and Burton writes on February 11th, saying:

"My dear Mr. Harlan: I have your telegram telling

me that things were satisfactory between you and Dice. I hope you are not letting him mislead you in any way.

I will be in St. Louis the fore part of next month, so soon as Congress adjourns, and shall aim to remain several days.

Be sure and keep me advised if there is anything to do at this end of the line before going away. I have tried to keep the Department in a good humor with Major Dennis, and I think I have succeeded.

If agreeable, on receipt of this, I wish you would have my monthly pay sent in, so I can reach it by Monday next. Faithfully yours,

J. R. BURTON."

This is the end of the case so far as concerns any interview with any officer of the Government having the remotest connection with or relation to the Brooks Brokerage Company, or Dennis or the Rialto Company.

And the only thing that had been done affecting the Rialto Company in any way was to inquire on November 20th whether there were any complaints against the Company, and getting the information that Mrs. Houts and Mrs. Evans had made complaint of some kind, and this information the Company already had, with the further information, which Burton had not until later he received it from the Company, that the complaints had been investigated and found unwarranted. No official had done or omitted anything because of Burton, and no official charged with determining directly or indirectly whether a fraud order should issue had been spoken to by him. He had said to Cochran, who was the official chief of the Inspectors, but who had no authority to either issue or recommend a fraud order, and who had no knowledge of the case and was not himself doing anything whatever about it, either that the Company was doing a legitimate business, or that he was so informed. He did not pretend to Cochran that he knew anything of the Houts and Evans charges, and never said a word respecting them.

### Dennis Breaks Down.

Early in February, 1903, Dennis collapsed physically and mentally, and Mahaney took charge of the Company's affairs.

### The McGowan Incident.

Mahaney testified that McGowan had presented a claim against the Rialto Company, and was acting very arbitrarily about it, and represented himself as being in high standing with the Government. Mahaney inquired concerning him, and Burton answered that he was an Indian agent in whom the Indian Bureau had great confidence. When the matter was fully developed, the court held that it had no relevancy to the case.

### The Special Inspectors.

On the 25th of February, 1903, Mahaney telegraphed to Burton (Rec. 155):

> "Report to me to-day from apparently reliable source that two special inspectors have been appointed to investigate us and report to Postmaster General. Please verify and advise at once."

This was answered on February 27th, 1903:

> "No complaint in the Department against you. Will write full particulars by to-night's mail."

There is no evidence of any visit to Cochran or anybody else in this connection, and the answer in any event involved nothing more than an inquiry. As a matter of fact no inspectors had been sent, nor had anything of the sort apparently been contemplated.

### Interview with Mahaney March 26th, 1903.

On March 26th, 1903, Burton was in St. Louis, called at the Rialto Company's office and received his last pay, being for the month beginning March 15th.

There was some conversation, Mahaney doing most of the talking. His testimony is that he said to Burton that, so far as he knew, there was nothing pending in the Department, and, as Congress had adjourned and there was no occasion for Burton's services, and they wished to reduce expenses, Burton would see the justice of discontinuing this particular charge. Burton agreed to this immediately. Mahaney says he added that if at any further time the Company needed his services they might communicate with him at his home in Kansas. Burton, he says, agreed with him that there was nothing dangerous pending in the Department, but did not state how he knew. Mahaney had no knowledge of the purposes or the scope of Burton's employment. Mahaney was indicted by the Federal Grand Jury because of his conduct of the Rialto business, in October, 1903, and his indictment has never been brought on for trial.

Hector McRae testified with respect to this same interview. He had been jointly indicted with Mahaney, and had never been tried. According to McRae, Burton said that his connection with the Company had been satisfactory, but that there was now nothing for him to do; that before leaving Washington he had called at the Department and found that there were no complaints against the Company.

There was no evidence that Burton had called at the Department since February 5th, and the jacket shows that in March, 1903, complaints had been made by Hon. Jesse A. Frye, U. S. Attorney at Washington, and by F. P. Andrews, Coden, Alabama, the first of these having been sent to Inspector Dice March 10th, 1903, and the second on March 20th, 1903.

If there ever was any thing for Burton to do for the Rialto Company in the Department, there was more on March 26th, when his connection with the Company was terminated, than ever before.

Active investigation of the Company was begun on the 27th day of July, 1903, by Inspectors Price and Piatt.

Dennis, who knew why Burton had been employed, had returned. The investigation continued for a month, and was of a very serious character, but Burton was not called on for help, nor communciated with in any way.

Burton's testimony as to this interview is that he called for his pay and got it, and that he said he wished this to terminate his contract. Mahaney said he supposed that if Dennis was there he would want Burton to remain, and Burton replied, "Well, he is not here and that matter can come up later," or something of that kind.

### The Alleged Destruction of Letters.

Mahaney says Burton asked in the interview whether he had any correspondence of his, and he found he had two letters. "We looked them over, and I think the Senator said 'these are of no particular consequence, but inasmuch as my name was unfortunately connected at one time with the National Securities Company, it is just as well not to have these things in existence; if they fell into unfriendly hands they might possibly be misconstrued, although there is nothing in them that appears irregular, and with your sanction they had better be destroyed.' I destroyed those two letters."

Mahaney says these letters were, one with respect to the McGowan matter following the telegram of February 11th, 1903, and the other, a letter referred to in the telegram of February 25th, 1903. They were both of them in substance the same as the telegrams they followed and confirmed. Burton, the witness says, did not ask for the telegrams, and did not ask for any other letters.

McRae says there was some talk by Senator Burton about a great deal of annoyance that had been caused by the use of a letter by the National Securities Company to which his name was appended and that he did not wish for this notoriety. This talk was casual, and did not make much impression on the witness at the time.

McRae testified to nothing concerning this on the first trial in March, 1904, and did not think of it then. He had not paid much attention to it, but, he says, "My memory has been freshened and I remember distinctly the reference to the National Securities Company."

The defendant denies the occurrence IN TOTO.

It is remarkable that if at that time the defendant was engaged in gathering in and destroying evidence against himself that he should have stopped with these two letters which were substantially identical with two telegrams addressed to the same individual. If Mahaney, who was then in control of the Company's affairs, was willing to give up two letters, he would be as willing to give up more, but no more were asked for, although known to exist and to be under the control of Mahaney.

## The Brooks Testimony.

Charles H. Brooks, the man referred to as having operated the Brooks Brokerage Company before it was bought by Dennis, and who in the testimony in this case was charged with being the responsible party on account of the transactions for which Dennis was indicted, was called on this trial as a witness on behalf of the Government. He was indicted jointly with Dennis in December, 1902, and later was indicted for conducting a get-rich-quick scheme. On this last indictment he was tried and convicted, and at the time of the trial his case was pending on appeal.

He testified that in the early part of January, 1903, Burton and one Richard Kastor came to his office in St. Louis, and Kastor said the Senator was willing to represent the National Securities Company (the concern Brooks was then operating) before the Post Office Department, provided they could agree on terms. Brooks answered that his business was legitimate and there were no complaints against him that he knew of and he was anticipating no controversy.

Kastor said the Government was investigating all speculative houses in St. Louis, and it was but a matter of time until they investigated Brooks, and then Burton could be of use to him before the Department. Brooks said he could not see how the Senator could stop the investigation, and Kastor, pointing to the Senator said, "Here's the man who has defeated you in your fight against Dennis and stopped the issuance of a fraud order." Brooks responded "if he has that influence with the Department, I think I had better also employ him to protect this business." (Rec. 201.)

On cross examination he said he had no arrangement with the Government for favor or consideration of any kind, that he had told no one of this matter save his attorneys until ten days before, when he was sent for or subpoenaed by the Government. He did not direct his attorneys to inform the Government of this and did not consult them after he was subpoenaed, and the testimony was absolutely volunteered on his part.

Burton testified that no statements of the kind were made in his presence by Kastor or any one else. (Rec. 241.)

Apropos of this testimony, it may be observed that Kastor's alleged statements concerning what Burton had done, were not true to the knowledge of Brooks. The fight of Brooks was against the Brooks Company, and Burton did not come within range of events until investigation was had and indictments were about to be returned. At the time of this alleged conversation, indictments were pending against both Brooks and Dennis. Brooks had not attempted to secure any fraud order against the Rialto Company. The complaints in evidence themselves show that they did not originate with Brooks, that they were not incited by him, and that he had nothing to do with them. The fight that Brooks had made, the fight against Dennis in connection with the Brooks Company, had not failed, but on the contrary had resulted in indictments, and had indeed succeeded altogether

too well, for "the engineer was hoist by his own petard." The sum of Brooks' testimony is that he declined Kastor's suggestion of Burton's service because his business was legal and he did not need it, and then, upon representations that he knew to be false, was willing to consider the matter.

## Addenda to Interview of February 5th, 1903.

After the business which Burton had with Cochran on February 5th, 1903, was concluded, there was some general conversation which the Government relies upon as in the nature of an admission after the fact.

Cochran testified concerning this:

> "After this matter had been settled, or arranged, the Senator said to me, 'Cochran, I want to continue to appear before the Department in this and other cases, because I can make some money in that way to apply on my old debts,' he said he had lost very heavily in the panic, and that he had paid about seventy thousand dollars of debts for which he was not liable, but that he would never plead the statute to bar. He said there wasn't anything wrong in this; that a number of Senators—Senator Edmunds among them—had materially increased their income in this way, and then it was entirely proper.
>
> Q. Was that all—about all that was said? A. He said that if he ever overstepped the bounds he wished that I would tell him so.
>
> Q. Was there anything said to him at that time, or did he say anything to you at that time about the right of a Senator to appear before the Department for compensation? A. No, sir, he—he did say, however, that in all of these matters he would never antagonize the Department, that his efforts would be directed to bringing about a harmonious adjustment of differences, and, even if he thought the Department was wrong in the action taken, that he would not oppose them." (Rec. 164.)

On cross examination he testified:

"Q. Now, you recall the former trial, were you not asked 'Q. At any of these interviews between Senator Burton and yourself prior to the indictment did he indicate to you that he would not undertake to appear in the Department against the United States,' and you answered 'He did,' that is correct, is it not, Mr. Cochran? A. Yes, sir, I believe so.

Q. You say you think so—I didn't quite get your answer? A. I said I thought so.

Q. Then you were asked, 'Q. Are you able to recall on which occasion that occurred,' and you answered 'Why, I cannot with any certainty. The Senator told me that several times,' that is correct? A. I believe that is right.

Q. 'Q. Disclaimed whenever the occasion arose, didn't he, any purpose or intention to appear there against the United States?' 'A. I think he did, yes, sir.' That is correct? A. Yes, sir, that is correct.

Q. 'Q. Do you recall his having indicated that so far from desiring to appear as against the United States, if an occasion arose when summary action was necessary that he did not even ask to be notified with reference to it?' and you answered, 'No, sir, I cannot recall that. He did say, however, that he would not antagonize the Department, no matter whether he thought they were right or wrong or not, that even if he thought the position taken by the Department were wrong, even then he would not oppose them.'" (Rec. p. 175.)

Burton testified:

"I think something was said of a personal nature, about my having lost my fortune in the panic and the long hard years that followed, and that I was trying to supplement my salary, which was very small compared with the demands made upon a Senator, by the practice of my profession. And that this case had been tendered me, and I was very glad to get it. And then I said, 'Now, again, Mr. Cochran, I am the attorney of a company'—I don't know that I distinguished or

named the company—'that has got to do with the mails.' I thought he would understand it. 'And I am anxious that there shall be nothing on my part that would be in the least bit questionable. I cannot afford to remain the attorney of the Company if it is in trouble with the Department at all.' I don't remember the words, but that was substantially it.

Q. What did you say, if anything, with respect to having practiced in the Departments, or other Senators having practiced in the Departments? A. I think that arose in this way: I had been in doubt—I knew the old custom in the Senate was that Senators who were lawyers continued their practice in the courts and as counsel. Men like Conkling and Edmunds and other lawyers. When I went to the Senate I didn't know but that some custom had grown up to change that. Of course, I knew they had a right to do it. I think I spoke of that, I had inquired and found there was nothing—no custom against it, and that it was all right. I know I mentioned Edmunds' and Conkling's names. But I did not say anything about them practicing before the Departments.

Q. What about yourself practicing before the Department? A. Oh, no, it wasn't there—it was practicing my profession.

Q. What was the case that had been referred to by you? A. The only case was the case against Major Dennis. I notice Mr. Cochran speaks about that case made on the two complaints. He might have done that without my comprehending what he meant. I never knew they called it a case. I supposed every complaint stood on its own foundation, and I never heard of a jacket, or complaint, until Colonel Dyer was making his opening statement in the last trial." (Rec. p. 289.)

This supplemental talk proves nothing in itself and adds nothing to the proof that had gone before. It was not action before the Department, and was not either the assertion or admission of anything done before that time as to which there was not as complete substantive evidence of the fact as the nature of the case permitted.

According to Cochran, the defendant characterized what he had done as practicing in the department in the Rialto Company's case, and yet at the same time said he would never appear in the Department against the United States and would not oppose the Department even though he thought it wrong. And this is applied by Cochran to a matter in which the only thing defendant had done, was to inquire whether any complaints existed, and as to which Cochran had no knowledge save that two complaints did exist, and even this knowledge he acquired in connection with the defendant's inquiry. And the matter was one to which Cochran had given no attention and to which he gave none thereafter, as to which he was not asked to do, or to refrain from doing anything. It is inconceivable that anybody should have talked of this as practicing in the Department.

Burton had also made inquiry whether two men representing themselves to be post office inspectors were in fact such, and was answered by Cochran that they were not. Certainly nobody considered this as the practice of law.

Then there was the introduction of Dennis' after he had been indicted and the ensuing conversation as to family names.

The only thing approximating practice or service in the Department was with respect to the Brooks Brokerage books. As to this there were statements and arguments made. The Department officials were requested to do something, and the matter was taken up to the Fourth Assistant and then to the Postmaster General. But this was not the Rialto Company's case, although Cochran thought it was. It was an incident of the Dennis case in which Senator Burton had been employed and in respect to this case he had the right to render service whenever and wherever occasion therefor might arise.

This Dennis case was the only case in which Burton had

done anything that could be characterized as the practice of his profession and must have been the case referred to as there was no other. Incidentally it had brought the defendant into contact with the Department and thus he had learned of the existence of complaints against the Rialto Company, whose counsel he was, and so would naturally and properly say that he "could not afford to remain the attorney of the Company if it is in trouble with the Department at all."

**Interview with Cochran January 23d, 1904.**

This was immediately after the indictment was found against Burton and on the day the fact was announced in Washington. Nothing in this interview adds anything to the substantive evidence in the case. There was not even anything that can fairly be called an admission. It was altogether a matter of characterizing what had been done by Burton in his relations with Cochran. And it is to be borne in mind that Cochran, at that time, was under the belief that everything Burton had done was done by him for the Rialto Company. He had not the Dennis case or the Brooks books in mind. At the best, Cochran's testimony is vague and indefinite. According to Cochran, Burton spoke of visits to the Department and getting information, but he did not understand that this was wrong. He asked what section the indictment was under, and what its purport was, and, being informed that it made it an offense for a member of Congress to practice before the Department, he said he had not been practicing before the Department. Before this he said he had appeared as attorney for the Company. He had been glad to get his employment, as it was a profitable one. Burton reminded Cochran that he had frequently assured him that he did not wish to antagonize the Department, and Cochran said this was so. It was quite a long conversation. (Rec. 165-166.)

Mr. Vickery's testimony was very much to the same effect, with an addition on cross examination suggesting that Burton said he had received a fee specifically for appearing before the Department. His testimony was:

> "Q. Now didn't he say at that time that he had been employed in this case as Attorney,; that he had met them at St. Louis on his way either to or from a session of Congress; that he had received a fee from them, a good fee—that he was not a cheap attorney and would not accept service unless they could pay; that it was intended or expected that he might be here at some trial, but afterwards that had been abandoned, they having determined it was not necessary, and he did not come? A. Yes, sir, he said that.
>
> Q. So that the fee that he referred to was in the case that was expected to be tried here? A. No, the fee wasn't referred to in that case. The fee was for his appearance, as he related to Mr. Cochran, his appearance before the Department as attorney, because he quoted that he mentioned to Mr. Cochran on his visit with Mr. Cochran that he wouldn't antagonize the Department. He mentioned that particularly as something incidental—it was his intention he should appear here in the case, but that was abandoned afterwards." (Rec. p. 179.)

Burton testified:

> "In the dispatches that were brought to me by an Associated Press man, Mr. Cochran's name was mentioned as having been in St. Louis and testifying before the Grand Jury, I think. I don't know about that; at any rate, he had been here about that time. I asked my secretary, Col. Smith, to ask him if he would not come to the office. He did come, and brought with him Mr. Vickery. I asked him if he could tell me what this case was about; he said that he had testified before the Grand Jury, and that he was not at liberty to tell what he had testified to. I told him I did not ask him to tell me what he had testified to before the Grand Jury, but to tell me, if he could, what was the nature of the charge against me. He said he thought—I

think he also remarked that he would probably be a witness, and hesitated to say anything. He said that it was founded, as he understood it, on Section 1782; and I asked him further about it, and he said it was a charge for practicing before the Department. I said 'Well, Mr. Cochran, I haven't practiced before the Department. What cause have I tried before the Department?' I think those were my questions, or something of that kind. And he didn't seem to want to talk, and I said, 'I haven't any hesitancy in giving my memory of it' I said, 'I told you I was the attorney of the company, but I was not its attorney there. That under no circumstances could I be employed to try a case in the Department.' I said, 'I have gone before the Department the same as I have gone to the Pension Department, and other departments, and if I cannot do that without being treated in this way, I will quit.' I said, 'I have tried always to be in harmony with the departments, and not be in opposition to them.' And when I got through talking, in a few moments, he said to me, 'Senator, I will make one statement notwithstanding I do not want to talk. You did say that you could not be employed under any circumstances as an attorney in the Department.'" (Rec. p. 240.)

W. W. Smith testified as to this:

"The Senator asked Mr. Cochran in regard to the indictment that they had just learned had been rendered against him in St. Louis. And Mr. Cochran went on and said, that he thought it would be improper for him to discuss it or talk about it. But the Senator said he wished to say to him, and to talk to him about it; he wished to tell him just that he wished Mr. Cochran would tell him how it came about, or why he was indicted, and under what statute he was indicted. And I think Mr. Cochran, as he stated to you, told him that it was under Section 1782 of the Revised Statutes, which provides against the appearance of Senators and Representatives before any of the departments of the Government for pay. And the Senator went on and told him his version of it. That he was not aware that he had ever infringed upon that statute,

or that he had appeared before any department for pay. And while he conceded that he was the attorney of this company, he emphasized the matter, as he had done before, that it was not for pay, and that he could not be employed by anybody to appear before any department for pay.

Q. When the Senator had finished, what did Mr. Cochran say? A. When the Senator got through Mr. Cochran said, 'Well, Senator, I will make one statement; and that is, that you did tell me that you did not appear before the Department for pay; nor neither could you be employed to appear before the Department for pay, for anybody, by anybody.'" (Rec. pp. 252 and 253.)

In rebuttal Mr. Vickery denied that Cochran had made the statement contained in the last paragraph of Mr. Smith's statement. Mr. Cochran did the same, but at the former trial, although in the court room and having heard Mr. Smith's testimony, he did not.

And we submit as to it all, that whatever the defendant did or did not do, he did not practice in the Department for the Rialto Company. Burton inquired, "What cause have I tried before the Department? What have I done before the Department?" What answer did or could Cochran make? The only answer possible was that Burton had made an inquiry of a [illegible] statement to an official who was not charged with either hearing or determining the matter involved and concerning which neither the official nor the Senator knew or professed to know anything.

## The Newspaper Interviews.

The testimony of Mr. Lindsay on cross examination consisted of a verification of his testimony on the former trial, when, as he says, the matter was much fresher in his memory. This is the substance of it:

"The Senator said over the phone that he had received a dispatch from St. Louis saying that he had

been indicted there and he said he didn't know exactly what it was all about; that he was not guilty of any wrong doing; that he was going to St. Louis as soon as he could and insist upon a trial, and he said it was in reference to the Rialto Grain and Securities Company, I believe, and that the only connection he had with it was through Major Dennis, who was an old friend of his, who had been indicted, and he was Major Dennis' attorney; that he had gone to the Department to see Mr. Cochran, I believe he said with Major Dennis, on an occasion, and he had told Mr. Cochran he had come there to see what charges there were against his client, and he had insisted to Mr. Cochran that he came as an attorney and not as a Senator, in regard to the matter." (Rec. p. 187.)

Mr. Aubere said he interviewed the Senator and later on the same day, it is suggested that it was after he had seen Cochran, something was added by interlineation. The report of the interview with the added words italicized is as follows:

"I was retained as counsel for Major Dennis during his trouble in the winter of 1892 and 1893. I became associated with Mr. Harlan, his local attorney, and other St. Louis counsel in a regular way, and upon the recommendation of mutual friends. I talked over the case with local counsel in St. Louis, and later Dennis came on here to Washington, bringing a copy of the indictment which had been found against him in St. Louis. I conferred with him about his case, and afterward went to St. Louis and conferred with his local counsel. While Dennis was here I went with him to the Post Office Department and introduced him to Supt. Cochran, Chief of the Inspection Service of the Department. I told Mr. Cochran that Dennis had been indicted by the Federal Grand Jury in St. Louis, and that I had examined into the case, and as far as I could see, I did not believe that there was a case against him. I wanted to know if there had been any complaint entered against Dennis before the Department, and I was told that there had not. I then told Mr. Cochran that, although I was Dennis' counsel, I could not be retained

to oppose the Department in this or any other matter, and would not do so. I told Mr. Cochran, and I believe he will bear me out in the statement, that both Mr. Dennis and his local counsel, Mr. Harlan, had advised me that Dennis proposed no violation of the Federal law, nor would he oppose any order or wish of the Department. This was done in the presence of Mr. Dennis, my client. *I called at the Department once or twice to inquire if any complaint had been lodged there against Dennis, and on those occasions repeated my previous statement that I was not there to oppose the wish, order or rule of the Department in any shape, manner or form.* After consulting with local counsel in St. Louis, as already explained when I was out there during the holidays, we agreed that as Congress was soon to reassemble, it was not necessary for me to remain in St. Louis in the trial of the case before the Courts." (Rec. 191-192.)

Again we submit that there is nothing added to the testimony in the case. Here is nothing but a second hand report of the recollection of casual transactions a year after they occurred.

**Why was Burton employed and what was he to do in the Course of his Employment.**

This inquiry, it seems to us, naturally arises in the case, and while the burden in respect of it was not on the defendant, t was material and proper that he should answer it if he could. The contention of the Government, the necessary implication of its case, was that Burton was employed to exercise a sinister influence in the Department, that the office of the Senator, and not the function of the counsellor, was desired, and that everything else was a mere pretext.

But there was the apprehended indictment against Dennis, a serious apprehension as shown by the event. Concerning this there were repeated conferences at Washington and in St. Louis by Burton with Dennis, with Harlan and with Krum, and it was desired that Burton should participate in

the trial, but later, when the case had been fully prepared, it was concluded that it was not necessary that he should come from Washington for that purpose. The suggestion that the indictment was a trivial matter was not appreciated by Dennis, who collapsed under the strain of it. Furthermore, the question is one of good faith, and we offered to show that in addition to Harlan, Krum and Burton, he desired still more counsel and wished to engage additional lawyers in St. Louis, and even brought a barrister from Montreal to assist, but the Court would not admit this evidence.

The Rialto Company expected to engage in the business of selling securities upon a popular plan, fully detailed by Mr. Harlan in his testimony in respect of which it was believed Senator Burton could be very helpful. This feature of his employment is slightingly treated because in fact nothing was done by the company concerning it. Nothing could be done until Dennis, the president and manager of the Company, was acquitted of the indictment, and when this had come to pass, his health broke down and he was not capable of business again until July. During the interval Mahaney had engaged in illegitimate practices, and the Company was wrecked in consequence. Meanwhile, Burton had ceased his connection with it.

In addition to these specific matters in mind at the time of the employment, other occasions for the services of a lawyer might well arise.

The statement of the evidence has been carried to this length because of the desire to set out everything having any possible bearing on the issues involved.

## MOTIONS TO DIRECT A VERDICT FOR DEFENDANT.

as to each count of the indictment were made at the close of the Government's testimony, and repeated at the close of all the testimony in the case. These motions were overruled. (Rec. 207 and 255.)

## THE CHARGE TO THE JURY.

The court then charged the jury as shown by the Record pp. 256-262.

Exceptions were taken to portions of the charge and to the refusal of the court to give instructions requested by defendant. The questions arising upon these exceptions are also involved in the motions to direct a verdict. It is not deemed helpful to set out the charge as given and the instructions refused in this statement. The questions involved will be considered in the argument in connection with the points to which they are related.

## THE ASSIGNMENT OF ERRORS.

will be found in the Record, pp. 270-281. The specific errors relied upon are set out in the Brief of Points and Authorities and the assignments of error involved are indicated under each head.

From the sentence and judgment the defendant has taken a

**Writ of Error.**

directly to this Court, under Section five of the Judiciary Act of 1891 (26 Stat. 826), which *inter alia*, provides for such writ of error, "in any case that involves the construction or application of the Constitution of the United States," and "in any case in which the constitutionality of any law of the United States * * is drawn in question."

**This Court Has Jurisdiction,**

because the case involves:

1. The construction and application of Art. III, Section 2, of the Constitution and the Sixth Article of Amendment, under which defendant is entitled to trial by a jury of the state and district in which the crime alleged against him was committed.

2. The construction and application of the Sixth Article of Amendment which entitles the defendant to be informed of the nature and cause of the accusation against him.

3. The construction and application of the provision of the Fifth Article of Amendment that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb * * * nor be deprived of life, liberty or property without due process of law."

4. The constitutionality of Section 1782 of the Revised Statutes of the United States, upon which the indictment was founded.

5. The constitutionality of Section 731 of the Revised Statutes of the United States as construed by the Circuit Court in the present case.

These questions are discussed under appropriate headings in the brief.

## BRIEF OF POINTS AND AUTHORITIES.

I.

**The United States was not a party to nor Interested in the Proceedings set forth in the Indictment.**

(Assignment No. 1, Rec. p. 270.)

Inhabitants vs. Smith, 11 Metc. (Mass.), 390.
McGrath vs. The People, 100 Ill., 464.
Evans vs. Eaton, 7 Wheat., 356.
State vs. Sutton, 74 Vt., 12.
Foreman vs. Town of Marianna, 43 Ark., 324.
Taylor vs. Commissioners, 88 Ill., 526.
Railroad Company vs. Kellog, 54 Neb., 138.
Sauls vs. Freeman, 24 Fla., 209.
Bowman's Case 67 Mo., 146.
U. S. vs. Wiltberger, 5 Wheat., 76.
U. S. vs. Sheldon, 2 Wheat., 119.
U. S. vs. Morris, 14 Peters, 464.
U. S. vs. Clayton, 2 Dillon, 218.

II.

**The Indictment states no facts showing the Pendency of of any Proceeding in the Postal Department.**

(Assignment No. 1, Rec. p. 270.)

U. S. vs. Hess, 124 U. S., 483.
Post vs. U. S., 161 U. S., 583.
Virginia vs. Paul, 148 U. S., 107.
American School, etc. vs. McAnulty, 102 F. R., 565.
Dauphin vs. Key, 11 D. C., 203.
Enterprise Savings Assn. vs. Zumstein, 64 F. R., 837; affirmed 67 F. R., 1000.
Bates & Guild vs. Payne, 194 U. S., 106.

Public Clearing House vs. Coyne, 194 U. S., 497.
U. S. vs. Ju Toy, 198 U. S., 253.
U. S. vs. Eaton, 144 U. S., 677.
Caha vs. U. S., 152 U. S., 211.

III.

**The plea of Former Acquittal as to the Offense Charged in the Third and Seventh Counts of the Indictment showed a former Indictment and Trial for and Acquittal of the Offense, and this plea was not avoided by the replication, and the Demurrer to the replication should have been Sustained. Placing the Defendant on trial again for the Offense Alleged was in Violation of the Sixth Article of Amendment to the Federal Constitution.**

(Assignments 2 and 3, Rec. p. 270.)

Baldwin vs. Bank of Newbury, 1 Wall, 234.
Mechanics Bank vs. Bank of Columbia, 5 Wheat. 236.
Ford vs. Williams, 21 How, 289.
New Jersey Steam Navigation Co. vs. Merchants Bank, 6 How, 381.
Commercial Bank vs. French, 21 Pick, 486.
Dugan vs. United States, 3 Wheat, 172.

See also numerous other cases collected in 2 Daniel on Negotiable Instruments (1st Ed.) sections 1187-1189.

State vs. Cooper, 13 N. J. Law, 361.
Hurst vs. State, 86 Ala., 604.
Cooley Constitutional Limitations, 7th ed., p. 470.
People vs. McGowan, 17 Wend., 386.
Monroe vs. State, 111 Ala., 15.
U. S. vs. Lee, 4 Cranch C. C., 446.
Ball vs. U. S., 163 U. S., 662.

U. S. vs. Nickerson, 17 How., 204.
Mitchell vs. State, 42 Ohio State, 384.
Campbell vs. State, 9 Yerger, 333.
State vs. Martin, 30 Wis., 216.
Stuart vs. Comm., 28 Gratt., 950.
Gunther vs. People, 24 N. Y., 100.
Morris vs. State, 8 S. and M., 762.
State vs. Kattleman, 35 Mo., 105.
State vs. Kibble, 2 Tyler, 471.
Dealy vs. U. S., 152 U. S., 539.

IV.

**A. There was no evidence to go to the jury that Burton made any agreement to receive compensation for services to prevent the issuance of a Fraud Order. Therefore the Court Erred in submitting to the Jury the question whether Burton made such agreement.**

**B. Whatever the agreement was which Burton made to receive compensation from the Rialto Grain and Securities Company for services, such agreement was not made in the State of Missouri, and the Defendant was deprived of his constitutional right to be tried in the State and District where the agreement was made, contrary to Section 2, Article 3, of the Constitution and of the Sixth Amendment thereof.**

Tayloe vs. Merchants Ins. Co., 9 How, 390.
Patrick vs. Bowman, 149 U. S., 411.
12 Enc. Law and Prac. pp. 239, 240.
Burr's Case, Marshall's Const. Dec. pp. 82-165.
Palliser vs. U. S., 136 U. S., 256.
Horner vs. U. S., 143 U. S., 212.
Sands vs. State, 26 Tex. App., 580.
U. S. vs. Fowkes, 53 Fed. Rep. 13.
U. S. vs. Dietrich, 126 Fed. Rep. 664.

Eliason vs. Henshaw, 4 Wheat, 225.
National Bank vs. Hall, 101 U. S., 43.
Ry. Co. vs. Rolling Mills, 119 U. S., 151.
Chitty on Contracts, 11 Am. Ed., p. 15, note f.
Christian Co. vs. Bienville Co., 106 Ala., 124.
Tennessee Co. vs. Pierce, 81 F. R., 814.
Seitz vs. Brewers' etc. Co., 141 U. S., 510.

V.

**There was No Evidence to Sustain Any Court of the Indictment.**

(Assignments 27, 31, 43 and 44, Rec. pp. 274, 276 and 280.)

VI.

**The agreement of the Defendant with the Rialto Company was for service by the month, and no service in the Department having been rendered during the period covered by the payment made March 26th there was no offense in the receipt of that payment.**

(Assignments 27, 31, 37 and 40, Rec. pp. 274, 275, 279 and 280.)

Davis vs. Preston, 6 Ala., 83.
Matthews vs. Jenkins, 80 Va., 463.
La Coursier vs. Russell, 82 Wis., 265.
Benedict vs. U. S., 176 U. S., 357.
In re Hans Nielsen, 131 U. S., 188.

VII.

**The Defendant was not subject to trial and punishment as for separate offenses in agreeing to receive and re-**

**ceiving compensation for the services charged in the Indictment to have been rendered by him.**

(Assignments 27, 28 and 31. Rec. pp. 274 and 276.)

2 Bishop's New Criminal Procedure, Sec. 55.
1 Ibid., Sec. 436.
State vs. Jones, 106 Mo. 802.

VIII.

**The juror William V. Jones was disqualified because he had formed and still retained an opinion as to the guilt or innocence of the Defendant, an opinion which was the result of reading the reports of the former trial, which reports he believed to be true, and the challenge to him should have been sustained.**

(Assignment 4. Rec. p. 270.)

Lewis vs. U. S., 146 U. S., 370.
Williams vs. U. S., 93 F. R., 396.

IX.

**The letters of Houts, Evans, Allen, Warner and Fravel, and the accompanying circulars and booklets, all of which were read in full, to the jury, were incompetent and irrelevant as against the Defendant, as he had no knowledge of them whatever, and their contents were not necessary to show the fact that some matter was pending in the department against the Rialto Grain and Securities Company.**

(Assignments 7 to 15. Rec. pp. 270 to 272.)

Tappan vs. Beardsley, 10 Wall., 427.

X.

**The endorsements on the jacket subsequent to March 26th, 1903, the Report of Inspectors Price and Piatt**

**of August 20th, 1903, and the letter of Assistant Attorney General Robb of September 9th, 1903, were competent and material evidence for Defendant to disprove the charges of the indictment that he had agreed to induce and had in fact induced the Postmaster General to issue no fraud order against the Company and to stop investigation of it, and also to show that the investigation being made by the Department was with reference to the indictment and prosecution of the Officers of the Rialto Company.**

(Assignments 16, 17, 29 and 30. Rec. pp. 273, 274, 275 276.)

XI.

**It was not competent for the witness Cochran to testify that he would have informed anyone on November 20th, 1902, whether or not there were complaints against the Rialto Company, but would not have given the names of the complainants, and that he gave them to the defendant because he was a United States Senator.**

(Assignment 23, Rec. p. 274.)

XII.

**The evidence of Francis C. Hubner should have been stricken out, as it established nothing and permitted the jury to conjecture that there had been an interview between the Defendant and the Assistant Attorney General for the Post Office Department relative to the affairs of the Rialto Company.**

(Assignment 26. Rec. p. 274.)

XIII.

**The instruction of the Court as to what would constitute service by the Defendant in the Department is not responsive to the charge of the Indictment, and authorizes a conviction on account of matters not alleged in the Indictment, and said charge is erroneous in other respects. The Court also erred in refusing to give instructions asked by Defendant.**

(Assignments 35-37-38, Rec. pp. 277 and 279.)

Flachskamm vs. U. S., 127 Fed. Rep. 674.

XIV.

**The Court at St. Louis had no jurisdiction to try Counts Three and Seven, nor is such jurisdiction conferred by Section 731, R. S. The District of Columbia is not a "Judicial Circuit" or "Judicial District" within the meaning of Section 731.**

(Assignment 31, Rec. p. 276.)

## ARGUMENT.

### The United States was not a Party to nor Interested in the Proceedings Set Forth in the Indictment.

In the former case in this Court the point was made that the United States was not "interested" in the matter charged in the indictment in that case. The majority of the Court held generally that the facts alleged in the indictment showed a case that was covered by the provisions of section 1782, Revised Statutes, but there is no discussion at all in the Court's opinion with reference to the question of "interest" of the United States. The question was distinctly made and ruled on in the Circuit Court in the present case and decided against the defendant.

We maintain, *first*, that the present indictment does not state a case in which the United States is "interested" within the meaning of section 1782, Revised Statutes; and, *second*, that even if the indictment in the present case stated a case showing that the United States is interested, nevertheless the proof shows that Burton neither agreed to render nor did render any services in respect of any matter in which in any view the United States had any interest, direct or indirect.

This question has never been passed upon by this Court, nor has this Court laid down any principle by which any act of the defendant which is proved in this case could be held to be an act in which the United States had any interest, direct or indirect.

Section 1782 of the Revised Statutes was intended to apply only to cases to which the United States was a party or in which it had some pecuniary or property interest.

The law was enacted in 1864, during the Civil War, and the specific evils which called it forth were, the agency of

Senators and Representatives in procuring contracts with the Government, their advocacy of claims against it, and their appearance for defendants in military and naval tribunals. See Congressional Globe, first session 38th Congress, pp. 93, 460, 455, 555, 559, 561, 714, 2773.

It did not and could not have specific reference to fraud order proceedings, for they were not authorized by any law then in existence.

It is not contended that a statute is necessarily confined in its operation to the precise evils which were the occasion for its enactment, but only that these may properly be considered in determining its scope and effect.

The act in question is not unqualified in its terms. It does not prohibit appearance for compensation by a Senator in all cases in which the United States is a party or interested. It does not prohibit such appearance in all cases pending in a Department.

Appearance in a case to which the United States is a party or in which it is interested is not prohibited if the case is pending in a civil court, and appearance in a case pending in a Department is not prohibited if the Unted States is not a party and not interested.

The service for which there may be no compensation accepted by an official must be *"In relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party or directly or indirectly interested, before any Department, Court Martial, Bureau, officer or any civil, military or naval commission whatever."*

The specification of "Department, court martial, bureau, officer or any civil, military or naval commission" excludes civil courts from the operation of the statute.

But there are other qualifying and limiting clauses, and they must be given some effect.

The service must be in relation to some "proceeding, con-

tract, claim, controversy, charge, accusation, arrest, or other matter or thing." Some of these words have a definite meaning. As to "contract, claim, controversy, charge, accusation and arrest" there can be no doubt. "Proceeding" and "matter or thing" are somewhat indefinite. For the ascertainment of their meaning the rules of *noscitur a sociis* and *ejusdem generis* are applicable. The associated words and the entire context suggest that the proceeding or matter or thing must be of the nature of a controversy, charge, accusation or arrest to which the United States is a party, or of the nature of a contract or claim in which it has an interest.

What now is meant by the United States being a party or interested? The term "party" has a distinct legal signification, and beyond a doubt it was used according to that signification in this Act. The Government might be a party to a contract or to a legal proceeding of some kind, designated as such in the agreement or proceeding. If so, the prohibition of the statute applies. But it has never been contended that the Government was a "party" to the proceeding here involved, and in none of the indictments presented has such an allegation ever been made.

It has been contended, however, that the United States was interested. But how? Was it interested in the sense contemplated by the statute? The word "interested" is used in immediate connection with the word "party," and it is to be presumed that it also was used in its fixed legal sense. The words have been frequently used by lawmakers in conjunction precisely as they are used here. Upon the occasion under consideration they were used by lawyers and primarily with reference to matters of a legal nature. The one word was certainly used in the sense, which in such context had always been attributed to it by the courts in the interpretation of statutes, and we must presume that the other word was used in like sense, that is, the sense which

in such context, had always been attributed to it by the courts.

What this legal meaning is admits of no doubt under the authorities. A pecuniary or proprietary interest is intended.

The case of Inhabitants of Northampton vs. Smith, 11 Metcalf (Mass.), 390, involved the construction of a statute of Massachusetts which provided, page 393, "that when a judge of probate shall be *interested* in any case within his jurisdiction, the case shall be transferred to the probate court of the most ancient adjoining county." The facts and the decision of the Court are sufficiently stated in the opinion of Chief Justice Shaw as follows (page 393):

> "This was an appeal from the decree of the judge of probate of the county of Hampshire, by which he declined, on account of interest, to take jurisdiction of the probate of the will of Oliver Smith, late of Hatfield, and directed the proceedings upon said will to be transferred to the court of probate of the County of Worcester, being the most ancient adjoining county. This objection is founded upon the provision of the Rev. Sts. c. 83, Sec. 15, directing that when a judge of probate shall be interested in any case within his jurisdiction, the case shall be transferred to the probate court of the most ancient adjoining county. The interest of the judge was supposed to arise from the fact, that he was one of the inhabitants of the town of Amherst; that there were, in this will, many bequests to charitable purposes, for the use and benefit of classes of persons described as dwelling in eight towns enumerated, of which towns Amherst is one; that if those bequests were beneficial to these towns, they had an interest, in their corporate capacity, in establishing the bequests, and of course in proving the will; and that by means thereof, Mr. Conkey, the judge of probate, as an inhabitant of Amherst and a member of the corporation, had a derivative interest in the same bequests.
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> (p. 394) "II. But the great question, and the one raised on the appeal, is, whether the judge of probate,

as an inhabitant of the town of Amherst, and a member of that municipal corporation, had such an interest in this will, within the meaning of the statute, as to supersede his jurisdiction of the probate of the will, and transfer it to another county.

"It is true that the plain dictates of natural justice, independently of all articles of magna charta, bills of rights, or other provisions of positive law, require that a man shall not be judge in his own cause. And it is only a just application of this principle, that he shall not sit in judgment in deciding a question in which he has a personal interest. But this, like all other very general propositions, in order to make it the basis of a practical rule, must have a reasonable construction, and must be taken, not as absolute and invariable, but with all necessary and implied qualifications. *If the term 'Interest' were used in the loose sense it sometimes is, consisting in a strong and sincere desire to promote all enterprises for the advancement of learning, philanthropy, and general charity, or a similar interest, with all good men, to repress and put down pernicious and mischievous schemes, no man could be found, fit to be intrusted with the administration of justice; for no man can be exempt from such interests.* But even where there are pecuniary interests, there must be some exceptions; as when the Commonwealth is a party in a criminal prosecution or a penal action, where the penalty enures to the State, and all civil suits on recognizances and other debts, or for the recovery of property, every citizen has a pecuniary interest. And yet none but citizens can be judges. Our own declaration of rights has made some approximation towards a limitation of the generality of the maxim, by declaring (art. 29) that 'it is the right of every citizen to be tried by judges as free, impartial, and independent, as the lot of humanity will admit.' It is obvious that no nearer approximation to the rule of absolute impartiality can be made, by any system of laws.

"We are then to consider what is the nature of the interest intended by Rev. Stat. c. 93, Sec. 15, which shall take the case out of the jurisdiction of the judge of probate, and transfer it to the court of probate of an adjoining county.

"1. We think it is not to be a mere possible, contingent interest; not an interest in the question or general subject, to which the matter requiring adjudication relates, but one that is visible, demonstrable, and capable of precise proof (Cottle, Appellant 5 Pick. 483; Sigourney v. Sibley, 21 Pick. 101, and 22 Pick. 507). It is not the bias or prejudice which would be sufficient to set aside a juror (Davis v. Allen, 11 Pick. 466). It is to be considered that such an interest, in the judge of probate, is not only to oust him of his jurisdiction, but is to confer jurisdiction on another court of proabte, which otherwise would not have it. It must therefore depend upon facts capable of being precisely averred and proved, and thus put in issue and tried. The importance of this consideration will be appreciated, when it is considered, that if jurisdiction is taken by a probate court, not entitled to it by law, the entire proceedings are void; the practical consequences of which may be extremely injurious (Holyoke v. Haskins, 5 Pick. 20; Coffin v. Cottle, 9 Pick. 287).

"2. It must be a pecuniary or proprietary interest, a relation by which, as a debtor or creditor, an heir or legatee, or otherwise, he will gain or lose something by the result of the proceedings, in contradistinction to an interest of feeling, or sympathy or bias, which would disqualify a juror (Smith v. Bradstreet, 16 Pick. 264).

"3. It must be certain, and not merely possible or contingent (Hawes v. Humphrey, 9 Pick. 350; Wilbraham v. County Commissioners, 11 Pick. 322; Danvers v. County Commissioners, 2 Met. 185). It must be direct and personal, though such a personal interest may result from a relation, which the judge holds as a member of a town, parish or other corporation, where it is not otherwise provided by law, if such corporation has a pecuniary or proprietary interest in the proceedings.

"*It may be, and probably is, very true, as the human mind is constituted, that an interest in a question or subject matter, arising from feeling or sympathy, may be more efficacious in influencing the judgment, than even a pecuniary interest; but an interest of such a charac-*

*ter would be too vague to serve as a test by which to decide so important a question as that of jurisdiction; it would not be capable of precise averment, demonstration and proof; not visible, tangible or susceptible of being put in issue and tried; and therefore not certain enough to afford a practical rule of action.* It is like the principle applying to the case of the competency of a witness; a direct pecuniary interest, however small, on being proved, renders him incompetent; but the strongest interest from sympathy, from interest in the question, and even an expected interest in the property in controversy, not yet vested, does not render him incompetent.

On examining this will of Oliver Smith, we cannot perceive that it vests any pecuniary interest, legal or beneficial, in the towns named, other than Northampton. The will provides for the future annual distribution of considerable sums of money in charity for the relief and assistance of various classes of indigent persons to be selected from those residing within the limits of these towns. But the distribution of a sum of money within the limits of a town, although it may give a spring to business, and indirectly benefit the inhabitants, as members of society, and holders of property, yet is not a direct pecuniary interest to the town in its corporate capacity, through which its members derive a pecuniary interest. And although it may be said, in a loose sense, that such a provision for various classes of persons, and the distribution of so much money, would be of great benefit to the town, and although the inhabitants of such town would feel strongly inclined to aid in promoting and establishing such a charity, and even be willing to pay money in securing it, yet, when strictly considered, it means only that such an establishment would be useful and beneficial to the dwellers in such town; not that it would confer any corporate right upon the town. It affords no direct or necessary exemption from taxes. It is the same interest which the inhabitants of a town often feel and manifest in the establishment of a college, academy, hospital, and even a court house and jail, within their limits.

> The Court are therefore of opinion that the town of Amherst as a municipal corporation, in its corporate capacity, takes no pecuniary interest, legal or beneficial, under this will, and that, of course, Mr. Conkey, Judge of Probate, as an inhabitant of that town, takes no such interest; that he is not prevented from taking jurisdiction of the probate of this will, and that no other probate Court of the Commonwealth can take jurisdiction of it.
>
> The decree of the probate court is reversed, and the case remitted to that Court for further proceedings in the probate of said will, and the settlement of the said Oliver Smith's estate."

A very pertinent case is that of McGrath vs. The People ex rel. Linnemeyer, 100 Ill. 464. The case and the decision on this point are stated accurately in the second paragraph of the headnote, as follows:

> "The State is not 'interested, as a party or otherwise,' in a proceeding in the nature of a quo warranto to try the title of a person to an office into which it was alleged he had intruded, in any such sense as would give to the Supreme Court jurisdiction to hear an appeal in such a proceeding directly from the trial court, under Section 88 of the Practice Act. The interest which the State must have in a cause, within the meaning of this section, in order to entitle either party to bring it directly to the Supreme Court from the trial court, is a substantial interest—as, a monetary interest."

This is directly contrary to the views taken by the trial Court in the present case. The trial Court in the present case held that the United States was interested in the question of the issuance of a fraud order, because of its general interest on behalf of the people that the laws should be enforced. In this quo warranto case of McGrath vs. The People the Illinois Supreme Court held that the State was not "interested, as a party or otherwise," in a quo warranto *to try title to an office created by the laws of Illinois.* This holding is utterly at variance with the holding of the trial Court in the present case, that a general interest or concern

that the laws should be enforced, is enough to make the United States Government "interested," within the meaning of Section 1782 of the Revised Statutes, in the question whether a person's mail should be stopped.

In the case of Evans vs. Eaton, 7 Wheaton 356, a question in this court was whether a Mr. Frederick was a competent witness, the alleged objection to him being that he was interested in the cause. This Court, however, held that he was not interested and that he was a competent witness. Mr. Justice Story, giving the opinion of the Court, said (page 425):

> "If the patent is declared void, the invention may be used by the whole community, and all persons may be said to have an interest in making it public property. But this results from a general principle of law, that a party can take nothing by a void patent; and so far as such an interest goes, we think it is to the credit and not to the competency of the witness."

It appeared in this case that Mr. Frederick was in a business where he might make use of the article alleged to be patented if the patent were to be declared void, and that in a certain sense he had an interest to having it declared void. On this point the Court, speaking by Mr. Justice Story, said (page 425):

> "But the special notice in this case asserts matter, which if true, and found specially by the jury, might authorize the Court to adjudge the patent void; and it is supposed that this constitutes such an interest in Frederick in the event of the cause that he is thereby rendered incompetent. But in this respect, Frederick stands in the same situation as every other person in the community."

In the case of State vs. Sutton, 74 Vt., 12, the case and decision are sufficiently stated in the following extract from the opinion of the Court:

> "This is an indictment under Section 5072 of the Vermont Statutes, for defaming this Court, and a judgment thereof, and the judges of the court as to said

judgment. It is objected that Judge Watson, who sat below, was disqualified by reason of interest in the event of the cause or matter, for that he is one of the judges alleged to have been defamed. It is a pecuniary interest that disqualifies, and Judge Watson is no more interested in this case in that respect than he is in every other criminal case that he tries, and that interest is too small for the law's notice. State vs. Batchelder, 6 Vt., 479. It is said that a judge defamed would be deeply interested to have the respondent convicted, not only that he might be severely punished, but also for the aid it might afford him in the prosecution and maintenane of a civil action for damages. But such an interest does not disqualify," etc.

In the case of Foreman et al. vs. Town of Marianna, 43 Arkansas, 324, the Court held that a judge who was a taxpayer in a town was not disqualified to sit in a case relating to the annexation of the town to a municipal corporation. On this point the Court said (page 329):

"It is objected here that the County Judge was disqualified, being a citizen and taxpayer of the town. It does not appear that his authority was challenged by any proper motion in the County Court, and we are free to say, that if it had been the objection ought not to have prevailed. It may be hoped that every good Judge in the State is deeply interested in everything that may help or hurt the community; and that he will favor the former and oppose the latter in all legitimate ways. Here the question is not one of taxes and burdens, but one of police. It does not even appear that, on the whole, the result of annexation, would be to increase or diminish taxes. But that is of no importance. This is not a suit of a personal nature, concerning property or rights of persons. A general interest in a public proceeding, which a Judge feels in common with a mass of citizens, does not disqualify. If it did, we might chance to have to go out of the State, at times, for a Judge. The interest which disqualifies a Judge, under the Constitution, is not the kind of interest which one feels in public proceedings, or public measures. It must be a pecuniary or property interest, or one af-

fecting his individual rights; and the liability or pecuniary gain or relief to the Judge must occur upon the event of the suit, not result remotely, in the future, from the general operation of laws and government upon the status fixed by the decision."

In the case of Taylor et al. vs. Commissioners of Highways of Town of Normal, 88 Illinois, 526, the Court stated the question involved and the decision as follows (page 527):

"The only question of any importance presented by this record is, whether a person has a right to appeal from the decision of the commissioners of highways in laying out a new road or vacating an old one, who does not own land adjoining the road laid out or vacated.

The statute which authorizes an appeal from the decision of the commissioners of highways to three supervisors, provides, '*Any person or persons interested in the decision of the commissioners of highways* in determining to, or in refusing to lay out, alter, inclose or vacate any road, or revoking any previous order or decision relative to any road, or from the verdict of any jury in assessing damages in opening, altering or vacating any road, may appeal from such decision to three supervisors of the county,' etc. The word 'interested' must receive a reasonable construction, such as will, on the one hand, protect those who have a direct and substantial interest in the matter, and, on the other hand, protect the commissioners of highways from unnecessary litigation in defending their action as such, at the suit of persons who may imagine they have an interest, when in fact they have no such interest as was contemplated by the legislature. Every citizen of a county, in one sense, has an interest in the public highways. So, too, it may be said, and properly, that every citizen of the State has an interest in the highways in the different counties of the State. If, therefore, the language of the statute is to be interpreted literally, an appeal might be taken by any citizen of the State. But we apprehend it was not the intention of the legislature that the word "interested" should receive such a liberal construction. It was, doubtless, intended to give the right

of appeal to those persons who had a direct and pecuniary interest not shared by the public at large, such as owned land adjoining the new road laid out or the old one vacated. * * *

We are, therefore, of opinion that no person has the right of appeal except those who may own lands adjoining the road to be laid out or vacated."

Chicago, Burlington and Quincy Railroad Company vs. Kellogg, 54 Neb. 138, was a suit to vacate a judgment rendered against the railroad company in an action at law for damages. The facts are stated in the opinion of the Court as follows (page 404):

"The Honorable F. B. Beall was the judge who presided at the trial of the law case, and he also presided at the trial of the case at bar. When this case came on for trial, counsel for the railway company objected to Judge Beall hearing it, claiming that he was interested, and therefore disqualified from hearing this case. The railway company's objections were overruled, and Judge Beall heard and determined the case at bar; and this action is the first argument made here for a reversal of the judgment. Sections 37, c. 19, Comp. St., provides that: "*A judge * * * is disqualified from acting as such * * * in any case wherein he is interested* * * *" But the word "interested," found in this section of the statute, probably means "pecuniarily interested," or at least it means that a judge, to be disqualified from hearing a case, must be in such a situation with reference to it or the parties that he will gain or lose something by the result of the action on trial. It is not claimed that Judge Beall will gain or lose anything from the result of this action. It is not pretended that he has any pecuniary interest in the matter. The argument seems to be that, because he rendered a law judgment, he would naturally be desirous that the same should be sustained, and that, therefore, his inclination would be to defeat this suit. It can never be presumed that a judge will permit his desires or inclinations to control his decision in any manner; and that he tried the case and rendered the judgment which is sought to be vacated by this action does not render him

whether the driving of living fat oxen was *"transporting"* such oxen within the meaning of the statute, and the Court held that it was not. The language of the statute was (page 120):

> "That if any citizen of the United States, or person inhabiting the same, shall transport or attempt to *transport* overland or otherwise, in any wagon, cart, sleigh, boat, or *otherwise*, naval or military stores, arms or munitions of war, or any article of provisions from the United States to Canada," etc.

The Court held that living fat oxen were articles of provision and munitions of war. The Court, however, held that the driving of oxen overland was not *"transporting"* them in any wagon, cart, sleigh, boat, or *otherwise."* This case furnishes a very pertinent illustration of the rule that in order that an act may be construed to be within a penal statute, it must clearly be within it, and that courts will never construe an act as within the statute unless it is clearly so. In this case the evil consequences of the act to the United States were just as great, whether the cattle were driven overland on foot or whether they were carried in wagons, but the Court, of course, held that it could not punish the act unless it was clearly within the statute.

So in the case of the United States vs. Morris, 14 Peters, 464, a case of indictment under a statute prohibiting the slave trade, this Court, Mr. Chief Justice Taney giving the opinion, said (page 475):

> "In expounding a penal statute the Court certainly will not extend it beyond the plain meaning of its words; for it has been long and well settled that such statutes must be construed strictly."

In the case of the United States vs. Clayton, 2 Dillon, 218, the Circuit Court (Dillon and Caldwell, J. J., sitting) held that Powell Clayton, Governor of the State of Arkansas, was not an "officer of election," within the meaning of a penal act of Congress, although it was a part of his duty

to issue and he did issue a certificate of election. The Court said (page 225):

> "It belongs only to the legislative department to create crimes and ordain punishments. Accordingly, courts, in the construction of statutable offenses, have always regarded it as their plain duty cautiously to keep clearly within the expressed will of the legislature, lest otherwise they shall hold an act or an omission to be a crime, and punish it, when, in fact, the legislature had never so intended. 'If this rule is violated,' says Chief Justice Best, 'the fate of the accused person is decided by the arbitrary discretion of the judges and not by the express authority of the laws.' (Fletcher vs. Lord Sondes, 3 Bing., 580.)
>
> The principle that the legislative intent is to be found, if possible, in the enactment itself, and that the statutes are not to be extended by construction to cases not fairly and clearly embraced in their terms, is one of great importance to the citizens. The courts have no power to create offenses, but if by a latitudinarian construction they construe cases not provided for to be within legislative enactments, it is manifest that the safety and liberty of the citizen are put in peril, and that the legislative domain has been invaded. Of course, an enactment is not to be frittered away by forced constructions, by metaphysical niceties, or mere verbal and sharp criticism, nevertheless the doctrine is fundamental in England and American law, that *there can be no constructive offenses; that before man can be punished his case must* be plainly and unmistakably within the statute, and if there be any *fair doubt whether the statute embraces it, that doubt is to be resolved in favor of the accused.* These principles of law admit of no dispute, and have been often declared by the highest courts, and by no tribunal more clearly than the Supreme Court of the United States (United States vs. Morris, 14 Pet., 464; United States vs. Wiltberger, 5 Wheat., 76; United States vs. Sheldon, 2 Ib., 119; and see also Ferret vs. Atwill, 1 Blatch., 151, 156; Sedgw. Const. and St. Law, 324, 326, 334; 1 Bish. Cr. Law, Secs. 134, 135)."

A crime consists of matters of fact and the definition of a crime consists of the enumeration of those matters of fact which constitute the offense. The things thus enumerated must all of them be alleged and proven as facts. In the present instance the facts enumerated and which must be alleged and proven are that, (1) the defendant was one of the officials named, (2) he received or agreed to receive compensation, (3) this compensation was for services rendered or to be rendered by him, (4) the services were in relation to a proceeding, etc., (5) the United States was a party to or interested in the proceedings, and (6) the proceeding was before some Department of the Government.

Each and every one of these elements of the offense is an element of fact, to be alleged and proven as a fact, and no one of them more than any other arises as a presumption of law from any or all of the other elements. There is no presumption of law that the defendant in any case under this statute was an official, because he received compensation for services rendered in a proceeding pending in a Department of the Government to which the United States was a party or in which it was interested. There is no presumption of law that he received the compensation because he rendered services. None that the proceeding was pending before a Department because the United States was interested or a party and none that the United States was interested or a party because it was pending in a Department.

There was an attempt to allege all these various facts in the indictment, whether efficiently done is another matter, and there was an attempt to prove, ineffective as we insist, all these various facts, save that the United States was interested, and this essential fact, made by the statute one of the constituent facts of the offense, was presumed as a matter of law from the fact that the proceeding was pending in a Department. It is no answer to say that the interest of the Government was shown by the nature of the proceeding,

when the proceeding is of such nature that to hold the Government to be interested is to hold it interested in every proceeding and in every matter or thing that may be before any Department. We must follow the definition of the statute, we must give effect to every element of that definition, or else we take from the statute a qualification and limitation and so broaden its scope and make that an offense which the lawmakers have not declared to be so.

In behalf of the defendant we have applied to the word "interested," a word used by lawyers and with reference to lawyers, the sense in which it has been used as determined by the courts, in every statute in which it is found in similar association and context, and unless it has the meaning thus ascribed to it, it has no meaning whatever.

## II.

## The Indictment States no Facts Showing the Pendendy of any Proceeding in the Postal Department.

The allegations of the sixth count, which may be taken as an example of all, in respect of the proceeding is:

> "That before and on the day in this count first aforesaid there was pending before the Post Office Department of the said United States and before a certain officer of that Department, to-wit, the then Postmaster General of the said United States, a certain proceeding in which the said United States was then indirectly interested, that is to say, a proceeding for determining the questions whether the said corporation was engaged in conducting a scheme for obtaining money from persons then resident in divers parts of the said United States, through the mails of the said United States, by means of false and fraudulent pretenses, representations and promises made by the said corporation to those persons, to the effect that it would invest such moneys as should be sent to it for investment in grain, and endeavor in good faith so to invest such moneys in grain

as speedily to make substantial profits for the persons so sending the same, and account for said moneys to said persons and not convert said moneys to its own use, —and whether the said Postmaster General should instruct the Postmaster at the Post Office of the said United States at St. Louis aforesaid, the same then being a Post Office at which registered letters were then arriving, directed to the said corporation, to return all such registered letters to the several postmasters at the several Post Offices at which they were or should thereafter be originally mailed, with the word 'fraudulent' plainly written or stamped on the outside thereof, to be by such postmasters returned to the writers thereof under the regulations of the said Post Office Department, and in the same manner to dispose of all other letters and matter sent by mail to the said Post Office directed to the said corporation, all of which the said Postmaster General might then have lawfully done, upon evidence satisfactory to him that the said corporation was engaged in conducting such a scheme to defraud as that in this count mentioned; and, further, that before and on the day in this count first aforesaid the facts pertaining to the questions in this count mentioned were under investigation by the said Post Office Department and the said Postmaster General, and on that day were still undetermined by the said Postmaster General."

The sufficiency of this allegation was appropriately challenged by demurrer.

The statute makes the pendency of a proceeding an essential element of the offense. The indictment charges in one series of counts that the proceeding was pending when the agreement for compensation was made, and in the other series that it was pending when the compensation was received.

It will be observed that the only charge of this element of the offense is the bald statement of the pleader's conclusion that the proceeding was then pending. No facts are averred from which the conclusion of pendency may be deduced, and so the defendant was denied the protection of

the Sixth Amendment to the Constitution, and was not informed of the nature and cause of his accusation.

In United States vs. Hess, 124 U. S. 483, which was upon the construction of an indictment under section 5480, the Court said:

> "The Statute upon which the indictment is founded only describes the general nature of the offense prohibited, and the indictment in repeating its language without averments disclosing the particulars of the alleged offense, states no matters upon which issues could be formed for submission to a jury. * * * The statute is directed against 'devising or intending to devise any scheme or artifice to defraud' to be effected by communication through the Post Office; *as a foundation for the charge* a scheme or artifice to defraud must be stated * * * with all such particulars as are essential * * * to acquaint him with what he must meet on trial. * * * The object of the indictment is, first: to furnish the accused with such a description of the charge as will enable him to make his defense * * * and, second: to inform the Court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had, for this, *facts are to be stated*, not conclusions of law alone."

As a scheme or artifice to defraud is *the foundation* for the charge under section 5480, so the pendency of a proceeding is *the foundation* of a charge under section 1782.

As it is essential under section 5480 to set forth the facts constituting the scheme to defraud, so it is essential under section 1782 to set forth the facts showing that a proceeding was pending in the Department, it being necessary in each case that the defendant may be enabled to make his defense, and that the court may determine whether the facts alleged are sufficient in law to support a conviction.

A proceeding may be said to be pending before a tribunal, whether the same be a court of law or an executive officer exercising quasi judicial power to hear and determine the

same, when certain things have been done by which *the matters or things to be determined are ascertained and take concrete form*, and by which they are brought *under the control of the tribunal for determination*. When these exist, the legal presumption of pendency arises, and only by the application of the law to such facts can this conclusion arise.

For example, a criminal case becomes a matter pending when a Grand Jury has returned an indictment, or an information has been filed. A mere purpose on the part of the authorities to prosecute, which has not taken proper concrete shape, would not sustain a charge of pendency.

Post vs. United States, 161 U. S., 583.
Virginia vs. Paul, 148 U. S., 107.

In a civil suit the filing of a petition or a declaration begins the proceeding and thenceforth it is pending. Illustrative of this is the form of the common law plea of another action pending which is always pleaded: "And the defendant comes and defends the wrong and injury, when, etc., and prays judgment, etc., because he says that before the issuing of said writ, to-wit: on, etc., in the same court (or other court) the plaintiff impleaded the defendant *and issued his said writ and filed his declaration against him*, etc."

The modes of procedure in the Postal Department may be very different from those obtaining in criminal prosecutions or civil suits, but some mode of procedure there must be. Something must be done to institute a proceeding, some concrete facts must exist in order that the proceeding may be a pending one.

The question to be determined in a proceeding is not the proceeding itself, no more than the questions in a case are the case. The questions arise as a consequence of instituting the proceeding or the suit. If the Postmaster General was simply considering whether or not the Rialto Grain and Se-

curities Company was engaged in a scheme for obtaining money through the mails by means of false pretenses, this would be but a question in his mind, and not a proceeding in the Department.

If it be assumed that the Postmaster General might of his own motion formulate, take jurisdiction of and determine such question, then that he had done so should have been averred, and an opportunity given the defendant to know what state of facts he must meet, controvert or avoid.

If it be assumed that any person, or any one of a specific class of persons, or some particular official might institute the proceeding by filing a complaint or formulating the question to be decided, and presenting the same to the Postmaster General, then that would be the state of facts from which the pendency might be said to arise, and would constitute the facts of which the defendant had the constitutional right to be informed.

If the Postmaster General had, in pursuance of law, formulated regulations declaring the procedure under which said proceeding should be *brought into being*, and such regulations had the force and effect of law, and were exclusive of all other methods of instituting and conducting such proceedings, then an averment of such acts as these regulations required to be done to institute such proceedings should have been made in the indictment, to the end that the defendant might prepare his defense thereto, and that the Court might, by an examination of the acts averred and a consideration of the regulations made, determine whether or not the conclusion of pendency was established by the averment of facts. And although the trial court overruled the demurrer of the defendant, yet at the close of the trial it gave distinct recognition of the principle that pendency was a conclusion of law by instructing the jury as a matter of law from what facts the conclusion of pendency should be deduced. (Record p. 258, par. 3.)

The power and jurisdiction of the Postmaster General to hear and determine such a question as in the indictment is set out, arises from sections 3929 and 4041 Revised Statutes, as amended by Act of 1890.

The authority given by the statute to the Postmaster General is *to find upon evidence satisfactory to him* that a person or company is conducting a scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations or promises, *and upon such finding to issue an order* as the statute directs.

> "The officer exercises the same quasi judicial functions which have been exercised by the various executive departments since the foundation of the Government, in that he hears proof and decides issues of fact as well as questions of law."
>
> American School of Magnetic Healing vs. McAnulty, 102 Fed. Rep., 565, 568.
>
> Dauphin vs. Key, 11 D. C., 203.
>
> Enterprise Savings Association vs. Zumstein, 64 Fed. Rep., 837. Affirmed, 67 Fed. Rep., 1000.

Congress has vested this power, that is, the power referred to in sections 3929 and 4041 Revised Statutes, in the Postmaster General, and it is an exclusive lodgment of power. One which the courts cannot assume or interfere with without defeating the legislative will expressed in the statute, that the same *shall be exercised by the Postmaster General, with whom the power is exclusively lodged.*

> Bates & Gould vs. Payne, 194 U. S., 106.
>
> Public Clearing House vs. Coyne, 194 U. S., 297.
>
> United States vs. Ju Toy, 198 U. S., 253.

It being practically beyond controversy that the power is a quasi judicial one, involving the exercise of judgment and discretion, that it cannot be assumed by the Courts or by

any other tribunal without defeating the legislative will as expressed in the statutes, it follows that the power to hear and determine the question, averred in the indictment to be pending, is a power which cannot be delegated, and it necessarily follows that such a question, if lawfully pending anywhere, must have been pending before the Postmaster General *exclusively,* and that the allegation in the several counts of the indictment that "there was pending before the Post Office Department of the United States and before a certain officer of that Department, to-wit, the then Postmaster General of the United States, a certain proceeding, etc.," must be construed to mean that said proceeding was pending *exclusively* before the Postmaster General, and not to mean a duality of places or persons at which or before whom the said proceeding was pending.

There can be no pretense that the alleged proceeding referred to in the indictment has any legal authorization other than flows from sections 3929 and 4041 of the Revised Statutes, or that it means any other proceeding than that authorized by said statutes, nor can it be contended that such a proceeding can pend for determination before any person other than the Postmaster General, and, although, the officers and employes of the Post Office Department might properly be engaged in preparing such a case to be thereafter presented to the Postmaster General, or might be engaged in obtaining evidence at his request to present to him in support thereof, yet in no sense could it be said to be pending before such officers or employes, or before the Post Office Department, because no power to determine rests in them.

The postal laws and regulations prescribe the manner in which the pendency of a proceeding of the nature referred to in the indictment may be instituted, and they make that method exclusive.

Sections 3929 and 4041 Revised Statutes confer upon the

Postmaster General the jurisdiction to hear and determine the matters referred to.

Section 338 Revised Statutes provides "There shall be at the seat of Government an executive department to be known as the Post Office Department, and a *Postmaster General, who shall be the head thereof.*"

Section 161 Revised Statutes of the United States provides: *"The head of each department* is authorized to prescribe regulations not inconsistent with law and for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use and preservation of the records, papers and property appertaining to it."

Regulations made by the head of an executive department pursuant to the section last above quoted are of the force and effect of law.

United States vs. Eaton, 144 U. S., 677.

Sections 3929 and 4041 Revised Statutes of the United States have conferred upon the Postmaster General certain power and jurisdiction, but have fixed no particular method or course of procedure by which such jurisdiction shall be invoked and exercised by him.

Pursuant to the authority contained in section 161, the Postmaster General has provided regulations, which have the force and effect of law, prescribing the manner and method by which this jurisdiction shall be invoked, that is to say, he has fixed and determined the rules of procedure and the acts to be done and the things that must exist in order to invoke such jurisdiction and to bring any of the matters within the purview of such statutes into a condition of pendency before him.

These regulations have the force and effect of law when regularly made and promulgated, and the Courts are bound to take judicial notice of them when brought to their attention.

Caha vs. United States, 152 U. S., 211.

The regulations having any bearing upon the issuance of a fraud order are:

"Sec. 15. That the business of the Department may be properly transacted and conveniently arranged *and prepared for the final action of the Postmaster General when necessary*, it is distributed among its several officers as hereinafter provided."

P. L. & R. 1902, p. 20.

Sec. 16. The Postmaster General assigns to his office; the superintendence and government of the Department, the appointment of the officers, clerks and employes, the general direction of the postal service in all its branches, the management of its finances and disbursements of appropriations, the submission of cases to the President relating to the appointments to be made by him, the determination of appeals from the action of the several assistant postmasters general, the promulgation of rules and regulations, the consideration of claims of postmasters for credit or reimbursement for losses by fire, burglary, or other unavoidable casualty, the issuance of all orders requiring the formal approval of the Postmaster General, the custody of the official seal, *and the performance of all special duties enjoined by law upon the Postmaster General.*"

Id.

Paragraph 6 of section 20, P. L. & R., provides:

"The Division of Post Office Inspectors * * * is charged * * * with the *preparation and issue of all cases for investigation* * * * with the safe custody of money and property collected or received by Inspectors and *the preparation of cases* for submission to the Postmaster General for orders for the restoration thereof to the proper parties or owners."

"Sec. 21. The Assistant Attorney General is charged with the duty of giving opinions to the Postmaster General or the heads of the several offices of the Department upon questions of law arising upon the construction of the postal laws and regulations, or otherwise, in the course of business in the postal service; * * * the keeping and preparation of all correspondence with the Department of Justice relating to prosecutions and suits affecting or arising out

*The special plea* of the defendant in bar, the replication of the United States thereto, the demurrer to the replication, and the judgment of the Court thereon, appear in the record pages 20-30, inclusive, and are referred to in the statement of facts in this case, *supra.*

We beg that it specially be noted that the replication, or as it is styled—"amended answer to plea in bar," does not deny any of the allegations of fact stated in the special plea in bar, and therefore the said allegations of fact stand admitted on the record as true.

*The undisputed facts are,* that as to the payment of $500 on the 26th of March, 1903, said $500 was paid by W. D. Mahaney, vice-president of the Rialto Company, to Burton; that there was no other payment of $500 made by either the Rialto Company or Mahaney to Burton; that the money with which payment was made was the money of the Rialto Company, and that it was paid to Burton on account of the Rialto Company and not on account of Mahaney or any one else. In short, there was but one transaction in respect of this payment of $500.

In the indictment in the former case, the allegations of counts one and two were to the effect that this money was received from the Rialto Grain and Securities Company, and the allegations of count three in the former indictment to the effect that it was received "from one W. D. Mahaney, an officer and employe of the Rialto Grain and Securities Company, as compensation for services rendered by him, the said Joseph Ralph Burton, senator as aforesaid, to the Rialto Grain and Securities Company." The plea in bar alleges that this count three of the former indictment is "identical in law and in fact" with counts one and two so far as this payment was concerned; and the said plea in bar further alleges that the said $500 in each and all of the counts is the same $500, and not any other or different sum of $500.

On the trial in the former case the Judge directed a verdict of "not guilty" on said third count of the indictment, stating at the same time (Record in former case, page 235):

> "The third count wherein it is charged that the accused on March 26, 1903, accepted and received from an officer and employe of the Rialto Grain and Securities Company the sum of $500 for services rendered the Company before the Department is practically the same as the first count. It was obviously intended by the pleader for the purpose of informing the accused of the medium through which the money was received from the Rialto Grain and Securities Company, and if there is a verdict of guilty on the first and second counts, there should be no conviction on this third count because, as already stated, it is but another way of charging the same offense as is charged in the first and second counts."

Accordingly, the jury on the former trial, under the direction of the Court, rendered a verdict of "not guilty' on said third count.

The only way in which the United States Attorney undertook to meet this plea in bar appears in the record in the present case (page 29), in the so-called answer to said plea in bar, where said Attorney alleged:

> "And the United States further answering says, that the offense charged against said defendant Joseph Ralph Burton in said counts three and seven of the indictment herein is identical in legal effect with the offense charged in said counts one and two of the said original indictment, but the offense charged against the said defendant in counts three and seven herein is not identical in legal effect with said count three of said original indictment, as will appear from an examination of said counts."

The Court held in accordance with this view of the District Attorney, and adjudged that the plea in bar was not well taken, and overruled and denied the same (page 29). The only difference which exists between count three of the

original indictment on the one hand, and counts one and two of the original indictment and counts three and seven of the present indictment on the other hand, is in the allegation that this $500 was received from W. D. Mahaney, an officer and employe of the Rialto Grain and Securities Company, instead of the allegation that it was received from the Company itself. The trial Court in the former case, as is shown by the above quotation from its opinion (see record former case, page 235), held that the allegation was identical in law and in fact. The trial court in the present case held that the allegation of this payment of Mahaney, an officer and employe of the Company, was not the same thing as an allegation that this money was paid by the Company; and that an acquittal of the charge of receiving the money from Mahaney, an officer and employe of the Company, was not an acquittal of the charge of receiving it from the Company. The Court held this, although confessedly and indisputably there was but one payment, and that made by Mahaney, which fact appears and is expressly alleged in the plea in bar, and not denied by the reply or answer of the United States. Furthermore, the proof in this case shows that payment of said $500 was made by Mahaney, an officer and employe of the Company; that the money so paid was the Company's money (evidence of *Carr*, secretary of the Rialto Company, page 146, 147; and of *Mahaney*, vice-president of the Rialto Company, page 148).

Moreover, if in law the payment by Mahaney is not the same thing as a payment by the Company, then the Government is in the predicament of not having proved its fundamental allegations of counts three and seven of the present indictment, because their only proof is that the money was paid by Mahaney; and therefore if, as the Court held in this case, contrary to what was held in the former case, such payment is not a payment on behalf of the Rialto Company to Burton of the $500, then the fundamental allegation in

this case, that Burton was paid $500 by the Rialto Company, utterly fails.

The law is well settled, however, by numerous cases that an act done by an officer or agent of a corporation is equivalent to an act done by the corporation itself.

See on this point—

Baldwin vs. Bank of Newbury, 1 Wall. 234.
Mechanics Bank vs. Bank of Columbia, 5 Wheat. 326.
Ford vs. Williams, 21 How. 289.
New Jersey Steam Navigation Co. vs. Merchants Bank, 6 How. 381.
Commercial Bank vs. French, 21 Pick. 486.
Dugan vs. United States, 3 Wheat. 172.

See also numerous other cases collected in 2 Daniel on Negotiable Instruments (1st Ed.) sections 1187-1189.

The present case is much plainer than these cases, where it has been repeatedly held that an act done by, or an instrument payable to, an agent, even if the corporation is not named, is an act done by, or an instrument payable to, the Company.

That the plea in bar was good, and that the Court erred in holding it to be bad, is clearly sustained by the uniform line of adjudications, some of which we proceed to refer to.

In State vs. Cooper, 13 N. J. Law 361, the defendant had been indicted and convicted of arson, and later he was indicted for the murder of a man who was burned to death in the house. His plea of former conviction was held to be good, the Court saying, "It is sufficient if an acquittal of the one would show that the defendant could not have been guilty of the other." So in Hurst vs. State, 86 Ala. 604, it was held that a person aiding in the escape of two prisoners by one act, one of the prisoners being charged with misdemeanor and the other with felony, may plead conviction for

aiding in the escape of the first in bar of an indictment for aiding in the escape of the second.

The rule we invoke is that laid down by Cooley in his Constitutional Limitations, 7th Ed., p. 470, viz:

> "If the first indictment or information were such that the accused might have been convicted under it on proof of the facts by which the second is sought to be sustained, then the jeopardy which attached on the first must constitute a protection against a trial on the second."

The same rule is declared in People vs. McGowan, 17 Wend., 386.

Code Section 3803 of Alabama made it a crime for any officer to apply to his own use any of the revenue of the State. Section 3805 made it a crime for any probate judge, tax collector or constable to apply to his own use any money paid into his office. In Monroe vs. State, 111 Ala., 15, the defendant was indicted, tried and acquitted under Section 3805, and this was held to be a bar to prosecution under Section 3803, when it appeared that the funds, the conversion of which was charged was identical.

The accused cannot be deprived of the benefit of the Constitutional provision by splitting one transaction into several offenses. In United States vs. Lee, 4 Cranch, C. C. 446, the defendant was indicted for stealing a pocket book and a promissory note. He was convicted as to the pocket book, but because of a misdescription was acquitted as to the note. Later he was again indicted for stealing the note, it now being properly described. It was held that if the note was in the pocket book, the defendant should be acquitted.

And the question does not depend upon the validity of the first indictment. In United States vs. Ball, 163 U. S. 662, several defendants were indicted for murder. One was acquitted and the others were convicted and they appealed. The indictment was held to be bad, and the case reversed. They were all indicted again and pleaded former

jeopardy, and the plea was held to be good as to the one acquitted.

Nor does it matter how the acquittal was brought about in the first case.

In United States vs. Nickerson, 17 How., 204, the defendant was charged with perjury and was acquitted because of an erroneous ruling of the judge. He was again indicted for false swearing to the same fact, but the former acquittal was held to be a bar.

A careful examination of the Nickerson and Ball cases and the principle on which they rest, show that they are a full support for the sufficiency of Burton's plea of former jeopardy.

In Mitchell vs. State, 42 O. S., 384, the defendant was indicted for shooting B. with intent to kill. On the trial the Court erroneously held that because the defendant did not shoot B., although he shot at him, he could not be convicted, and the jury was discharged. The defendant was then indicted for shooting at B. with intent to kill, and it was held that the plea of former jeopardy was good.

Where there are several counts in the indictment, and a conviction on some of them and an acquittal on the others, and there is an appeal from and a reversal of the conviction, the acquittal stands, and this whether it was intended to charge the same transaction or entirely distinct offenses. The verdict of acquittal is absolute and unchangeable as the laws of the Medes and Persians. It is not reversible; it is not subject to appeal.

Campbell vs. State, 9 Yerger, 333.
State vs. Martin, 30 Wis., 216.
Stuart vs. Comm., 28 Gratt., 950.
Gunther vs. People, 24 N. Y., 100.
Morris vs. State, 8 S. and M., 762.
State vs. Kattleman, 35 Mo., 105.
State vs. Kibble, 2 Tyler, 471.

This Court in United States vs. Ball, 163 U. S. 662, said, p. 670:

> "The former indictment set forth a charge of murder, although lacking the requisite fullness and precision. The verdict of the jury, after a trial upon the issue of guilty or not guilty, acquitted Millard F. Ball of the whole charge of murder, as well as of any less offense included therein. Rev. Stat. 1035."

And on p. 671:

> "The verdict of acquittal was final and could not be reviewed on error or otherwise without putting him twice in jeopardy and thereby violating the Constitution. However it may be in England, in this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offense. United States vs. Sanges, 144 U. S. 310; Commonwealth vs. Tuck, 20 Pick. 356, 365; Wets vs. State, 2 Zabriskie, (22 N. J. Law), 212, 231; 1 Lead. Crim. Cas. 532."

In this case the defendant filed his plea in bar of the third and seventh counts of the indictment and set forth therein that he had been previously tried for and acquitted of the offense charged in these counts. In his plea he set out the third count of a former indictment, which charged him with having been, on the 26th day of March, 1903, a Senator of the United States, and with having on that day accepted and received from one W. D. Mahaney, an officer and employe of the Rialto Grain and Securities Company, five hundred dollars as compensation for services rendered by him to said Company in a proceeding against it pending in the Postal Department of the United States, in which the United States was interested.

The seventh count of the present indictment charges the defendant with having been, on the 26th of March, 1903, a Senator of the United States, and with having on that day accepted and received from the Rialto Company, through its officers, agents and attorneys, five hundred dollars as compensation for services rendered by him to said Com-

pany in a proceeding against it pending in the Postal Department of the United States, in which the United States was interested.

The plea averred that the defendant in the first case and the defendant in this case is the same man; that the Rialto Company is in each case the same corporation; that the proceeding pending in the Department is in each case the same proceeding; that the services rendered are in each case the same services; that the money received was in each case the same money; and that the money was in fact paid to the defendant by W. D. Mahaney, an officer and employe of the Rialto Company.

Absolute identity of transaction is alleged and shown by the plea, and no issue of fact was joined upon it. There was no room for controversy as to the facts, for these were thoroughly understood by all concerned. The question was considered by counsel upon both sides as one of law.

The sole difference between the indictment relied upon in the plea, and that to which the plea is filed is in the statement as to the receipt of compensation by the defendant. And this difference is not as to the fact stated, but merely in the form of stating it. In the first it is said that the defendant did "take, accept and receive from one W. D. Mahaney, an officer and employe of the Rialto Grain and Securities Company the sum of Five Hundred Dollars" as compensation for services rendered the Company in a proceeding against it. In the present indictment it is said that he did "receive directly from the said corporation, through its officers, agents and attorneys, certain compensation for the same services, that is to say, five hundred dollars," etc.

It is alleged in the plea, and it is true, that the payment was made by W. D. Mahaney; that Mahaney was an officer of the Company and that in making the payment he was acting for the Company and used the money of the Com-

pany. To distinguish the two indictments, the prosecution relies upon the difference between receiving money from a corporation through an officer, and receiving money from an officer of the corporation. But in each case the same money, the same corporation, and the same officer, and in each case the business of the corporation involved. If such distinctions could serve to differentiate, there would be no end of jeopardy.

The prosecution answers that the entire case has not been stated; that while the plea in bar was not denied, still the replication set out other and additional facts which avoided the plea.

The replication avers that there were three counts in the former indictment.

The first count charged that the defendant, being a United States Senator from the State of Kansas, did at St. Louis, Missouri, on the 26th of March, 1903, receive from the Rialto Grain and Securities Company, a corporation of the State of Missouri, the sum of five hundred dollars as compensation for services rendered by him to the Company in a proceeding then pending before the Postal Department of the United States, in which the United States was directly interested.

The second count was the same as the first, except that it charged that the United States was *indirectly* interested in the proceeding.

Upon these two counts it is alleged the defendant was convicted, prosecuted an appeal, and secured a reversal. And the replication concludes that the offense charged against the defendant in counts three and seven of the present indictment "is identical in legal effect with the offense charged in said counts one and two of said original indictment, but that the offense charged against the defendant in said counts three and seven of the indictment herein is not identical in legal effect with said count three of said original indict-

ment, as will appear from an examination of said counts."

It appears from the plea in bar and the replication that counts one, two and three charged the same transaction as an offense. The replication asserts that counts one and two of the first indictment are identical in legal effect with counts three and seven of the present indictment, but that count three of the first indictment is not so. It would follow from the averments of the replication that if the acquittal at the first trial had been on count one or two, the plea in bar would be good.

But count three of the first indictment is identical in every point of fact with counts three and seven of the pending indictment. The District Court, on the trial of the first case, in effect so held, for it held this count to be practically the same as one and two of the original indictment.

The Court charged the jury in that case as follows:

> "The third count wherein it is charged that the accused on March 26, 1903, accepted and received from W. D. Mahaney, an officer and employe of the Rialto Grain and Securities Company, the sum of Five Hundred Dollars, for services rendered the company before the Department, is practically the same as the first count.
>
> It was obviously intended by the pleader for the purpose of informing the accused of the medium through which the money was received from the Rialto Grain and Securities Company, and if there is a verdict of guilty on the first and second counts, there should be no conviction on this third count, because as already stated, it is but another way of charging the same offense as is charged in the first and second counts." (Page 235, Record of former case.)

In Dealy vs. United States, 152 U. S. 539, the Court said:

> "It is familiar law that separate counts are united in one indictment, either because entirely separate and distinct offenses are intended to be charged, or because the pleader, having in mind a single offense, varies the statement in the several counts, as to *the*

*manner of its commission,* in order to avoid at the trial an acquittal by reason of any unforeseen lack of harmony between the allegations and the proof. Bishop Crim. Proc., par. 422. Yet, whatever the purpose may be, each count is in form a distinct charge of a separate offense, and hence a verdict of guilty or not guilty as to it is not responsive to the charge in any other count. Take the case of an indictment for murder. Suppose in one count the homicide is charged to have been committed by means of a blow from a pick-axe, and in another by a shot from a pistol. While from the name of the deceased and the time and place of the killing it may be inferred that the same homicide is in the mind of the pleader, yet such inference is not, as a matter of fact, conclusive, and, as a matter of law, is overthrown by the dissimilarity in the means of homicide, and it certainly would be a novelty in criminal practice to have a verdict returned upon such indictment, finding the defendant guilty under one count and not guilty under the other adjudged a verdict of not guilty, as to both.

In the case at bar the section of the statute under which this indictment was found requires not merely a conspiracy, but some act to carry into effect its object. This act is only one of the means by which the conspiracy is sought to be carried into effect, just as in the illustration given, the blow of the pick-axe and the shot from the pistol are means for the accomplishment of the homicide and a verdict of not guilty as to any one of the counts in this indictment is not necessarily a finding against any conspiracy, but only that the conspiracy and the overt act therein stated did not both exist, while a verdict of guilty upon any other count finds both the conspiracy and the overt act named therein."

It is manifest here that one and the same offense was intended in all of the counts, and different counts were properly included in the indictment only in so far as they were different statements of fact as to the manner and means of the commission of the offense. It is not proper to cumulate counts in an indictment except to charge different offenses

or to meet various possible phases of proof. A defendant should not be burdened and prejudiced by repeated charges of the same offense in different phrase, without difference of fact, and his conviction secured by sheer dint of accusation.

If the very same facts are charged in two counts, and there is a verdict of guilty on one count and of not guilty on the other, the two verdicts are repugnant and cannot stand together. And in such case the verdict of guilty must fall, for it is subject to be set aside, while the verdict of not guilty remains.

In the illustrative case cited by the Court, in Dealy's case, *supra*, if the defendant were acquitted on the count charging the murder to have been committed by a pick-axe and convicted on that charging it to have been committed by a pistol shot, and the verdict of guilty were then set aside, the defendant could not again be tried upon the first count of the original indictment, and much less could he be charged by a new indictment with having committed the same offense in the very same manner, and by the very same means.

In Dealy's case the indictment was for conspiracy. There were many counts, but the conspiracy charged was the same; the overt act, however, charged in each count was different. There was no finding by the jury upon one of the counts which the Court held tantamount to an acquittal, and counsel for Dealy contended that this operated as an acquittal on all the counts, because only one offense was charged. The contention was that the verdict of acquittal negatived the existence of every fact charged against the defendant in this count as an element of offense. The Court answered that the effect of the acquittal was only that the conspiracy and the overt act stated in the count to which it applied did not both exist, while the verdict of guilty upon another count found both the conspiracy and the overt act named therein.

received, he thereby agreed to receive, and further the allegation is that he "knowingly" and "wilfully" received, which implies consent and agreement on his part, otherwise he would have rejected the money. Therefore, the act or offense of agreeing is included in the offense of receiving, which was alleged in said count three. And so, if Burton was guilty of agreeing to receive, that offense could have been proved under said count three, and Burton convicted thereof if guilty. Therefore, when by direction of the Court Burton was acquitted on said count three, that acquittal was an acquittal of agreeing to receive said $500, and is good in bar of the indictment for agreeing to receive said $500.

See *United States* vs. *Ball,* 163 U. S. 662, 670, construing said section 1035 Revised Statutes, and *United States* vs. *Nickerson,* 17 How. 204.

As Burton was on said former count three acquitted of *receiving* this $500, and of *agreeing* to receive this $500, this is an acquittal of the charge in counts one, two, six and eight of the present indictment, that Burton *agreed* to receive $2,500 as compensation for services. The $500 was part of this $2,500, and the allegation that Burton agreed to receive this $2,500 is negatived if Burton did not agree to receive this $500. As the acquittal on former count three decided that Burton did not agree to receive this $500, it decided also that he did not agree to receive this $2,500, of which this $500 was a part. Furthermore, any evidence to establish an agreement to receive this $500 might have been admitted in the former case; and the evidence which was introduced in the present case on which Burton was convicted of an agreement to receive this $2,500 was no other or different from the evidence which might have been introduced in the former case to convict Burton of agreeing to receive said $500.

Therefore, acquittal on count three in the former case is

good in bar not only of counts three and seven of the present case, but also of counts one, two, six and eight, which allege that Burton agreed to receive compensation for services.

Obviously, Judge Adams made a mistake on the trial of the former case when he said that because count three was like counts one and two, therefore if there was a conviction on counts one and two there should not be a conviction on count three. What he should have said was, if count three was like counts one and two, there should be a conviction on all three counts. This error of Judge Adams, however, was no other or different from the error of the trial court mentioned in the case of *United States* vs. *Nickerson,* 17 How. 204, where it was erroneously held by the trial judge in the first case that the indictment was so drawn "as to preclude the United States from offering evidence to prove that the defendant knowingly and wilfully swore falsely that the paper produced was the original agreement and that three fourths of the crew were citizens," and so holding, the defendant was acquitted. Such acquittal was held to be a good bar to a subsequent indictment. Nor is it any different from any other error of law committed by a trial court in favor of an accused person resulting in an acquittal. Such an error constitutes no reason for violating the mandate of the Constitution, that no person shall twice be put in jeopardy for the same offense. It was the duty of the prosecution on the trial in the former case to see that Judge Adams did not commit this error, and the prosecution cannot complain now if the defendant pleads this verdict of acquittal in bar of the present indictment.

## IV.

**A. There was no Evidence to go to the Jury that Burton Made Any Agreement to Receive Compensation for Services to Prevent the Issuance of a Fraud Order. Therefore the Court Erred in Submitting to the Jury the Question whether Burton Made Such Agreement.**

**B. Whatever the Agreement was Which Burton Made to Receive Compensation from the Rialto Grain and Securities Company for Services, such Agreement was not made in the State of Missouri, and the Defendant was Deprived of His Constitutional Right to be Tried in the State and District Where the Agreement was Made, Contrary to Section 2, Article 3, of the Constitution and of the Sixth Amendment Thereof.**

*First,* the indictment charges an alleged agreement of the defendant with the Rialto Company at St. Louis, Missouri, on November 18, 1902, for a stated compensation for services to be rendered by Burton in the Post Office Department at Washington to prevent the issuance of a fraud order. The first, second, *sixth* and eight counts in the indictment are of this character. The defendant was found guilty on these counts (record, page 33), and the Court rendered judgment on the *sixth* count that the defendant be imprisoned for six months and be fined in the sum of $2,000, and be forever incapable of holding any office of honor, trust or profit under the United States (record, page 35).

*Second,* the indictment charges that on the 26th of March, 1903, at St. Louis, the defendant received from the Rialto Grain and Securities Company $500 compensation for services rendered by him before the Post Office Department from November 18, 1902, to March 26, 1903, to prevent the issuance of a fraud order against the Rialto Grain and Securities Company. This is the substance of the charge against the defendant in the third and seventh counts of the indictment. The defendant was found guilty on these

counts (record, page 33), and sentenced on the *seventh* count to pay a fine of $500 and to six months' imprisonment, such term of imprisonment to begin and run concurrently with the term of imprisonment imposed by the judgment and sentence pronounced upon the sixth count of the indictment, and by his conviction under the seventh count that he be forever incapable of holding any office of honor, trust or profit under the government of the United States. The fourth and fifth counts of the indictment were *nolled* by the Government before the trial (record, page 19), and the judgment and sentence of the Court (record, page 35), states: The first, second and eighth counts upon which a verdict of guilty was returned appearing to cover the same transaction and offense as is embraced in the *sixth* count, it is ordered that no judgment or sentence be pronounced upon the first, second and eighth counts of the indictment; and it appearing that the third count of the indictment upon which a verdict of guilty was returned embraces and covers the same transaction embraced in the *seventh* count, it is ordered that no judgment or sentence be pronounced upon the third count of the indictment.

We deal under this head with the questions arising on the counts relating to the alleged agreement of the defendant at St. Louis on November 18, 1902, to receive compensation for services to be rendered by the defendant to the Rialto Grain and Securities Company to prevent the issuance of a fraud order. We deal under a separate head with the counts relating to the payment on March 26, 1903, for services alleged to have been rendered between November 18, 1902, and March 26, 1903.

There is no conflict of evidence here to deal with. It is conceded that whatever the defendant did in making any agreement was done in part in the State of Illinois and in part in the District of Columbia, but it is contended by the Government that he was at the time constructively present in Missouri.

The facts are briefly: that the Rialto Company was a corporation of Missouri, with its office in the city of St. Louis. Hugh C. Dennis was its President and Thomas B. Harlan was its local counsel. The President desired to employ the defendant, who at the inception of the matter, on November 17th, 1902, was passing through St. Louis. The defendant was introduced to Dennis and to Harlan, but there was no time to consider the matter, and Harlan took the train for Chicago with Burton to talk it over on the way. The train pulled out of St. Louis and was in Illinois before conversation respecting the employment was begun. Whatever was said by Burton to Harlan or by Harlan to Burton was said on the train or in Chicago. The scope of the employment as to the kind of services to be rendered was stated, a compensation of five hundred dollars per month for a period of at least five months was mentioned, which the defendant expressed himself as willing to receive, and which Harlan approved as reasonable, but nothing was said as to the time when the period of service was to begin or when it was to end. Harlan told Burton that he had no authority to conclude anything, but would take it up with Dennis on his return. The only testimony as to what was said concerning any notification to the defendant of Dennis' conclusion was that of the defendant, viz: "When I parted with him that night he said he had no authority to contract, but he would recommend that I be employed. And if it was decided to employ me that he would come on to Washington for a full conference." (Rec. 234 and 235.)

The defendant went from Chicago to Washington, and Harlan returned to St. Louis. Upon the day of his return to St. Louis, November 18th, and from St. Louis Harlan sent a telegram addressed to the defendant at Washington. This is not in the record. On the same day he addressed a

letter to defendant at Washington, which, so far as it relates to the question under consideration, is as follows:

> "Hon. J. R. Burton, Senate Chamber, Washington, D. C. My Dear Sir: Mr. Kastor and I arrived safely and on time this a. m. I found myself confronted with a number of engagements, which, together with Major Dennis' condition prevented me from wiring you as early an hour as I expected. However, I hope you received my message to the effect that this Company accepts your terms to act as counsel at a salary of $500.00 per month, said service to begin immediately; that is of this date, November 18th, 1902."

The letter also requested the defendant to call at the Department if convenient to inquire if the Government intended to prosecute Dennis. (Rec. pp. 112 and 113.)

The defendant received the letter on November 20th, went to the Department, made the inquiry suggested and also inquired as to some other matters. He then wrote to Harlan, advising him of the things he had learned, and concluded, "In return, if agreeable, you may make remittance for my first month's pay." (Rec. p. 114.)

Harlan replied on November 22nd, "I enclose the Company's check for $500.00 as per agreement. This check should have been sent in my former communication, but I neglected to do so." (Rec. p. 115.)

This covers everything bearing on the question of the place where the defendant did what is charged against him as an offense.

We are dealing with criminal and not with civil law, with the punishment of offenses and not with the enforcement of contracts, and we are dealing under the solemn sanctions of Constitutional provisions intended for the benefit of persons accused of crime.

**"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the state and district wherein the crime shall have been comitted.** (Sixth Amendment.)

It is needless to comment upon this, the fundamental law of procedure in the case. The history, the purpose and the meaning of this provision which guarantees an absolute right to the defendant are well known. No mere legal fiction can prevent its application. The place of the commission of an offense is and must be the place of trial for that offense.

## Charge of the Court as to the Alleged Agreement.

The following is the charge of the Court in relation to the alleged agreement (record, page 259):

> "The questions which relate exclusively to the counts charging the defendant with having agreed with the Rialto Grain and Securities Company at St. Louis, Missouri, to receive from that company a stated compensation for services to be rendered by him to that company in relation to the proceeding before named, are these:
>
> (1) Did he make such an agreement? That he made an agreement of some character to act as counsel for that company for a stated compensation, is conceded. The real question is, whether that agreement included, among other matters in relation to which he was to serve the company, the proceeding in the Post Office Department before named. Upon that question the evidence is conflicting, and it is your duty to weigh the evidence and determine the truth. If among other things it was intended by the defendant and the Rialto Grain and Securities Company in making the agreement that he would in part consideration for the compensation he was to receive, appear as agent or attorney of such Company before the Post Office Department or any of its officers charged with any duty or having any authority over such fraud order proceeding, for the purpose or with the intent of influencing or obtaining action on their part favorable to such Company in said proceeding, whether by way of stopping the investigation or ultimately preventing the is-

suance of a fraud order; then I charge you that the agreement of the defendant was violative of the statute; otherwise it was not. The offense prescribed in the statute consists in the agreement to receive compensation for the rendition of such services. The mere agreement to render the services is not an offense. It is the agreement to receive compensation for the rendering of them which constitutes the offense. It should be carefully observed that the actual rendition of services is not a necessary element of this offense. The offense is complete and the defendant's guilt is established if the evidence shows that he made an agreement to render such services for compensation.

(2) If there was an agreement on the part of the defendant to receive compensation for services to be rendered by him in such a fraud order proceeding, was the agreement made within the jurisdiction of this Court—in other words, was it made in Saint Louis, Missouri? Upon this question I charge you that if such an agreement was negotiated or tentatively effected at some other place, but with the understanding on the part of the defendant that it should be communicated to the Rialto Grain and Securities Company at Saint Louis, Missouri, to be there accepted or ratified by that company before it should become effective, and if thereafter, in pursuance of such understanding, the proposed or tentative agreement was communicated to the Rialto Grain and Securities Company at Saint Louis, Missouri, and was there accepted and ratified by that company without any change in the terms, then the agreement was made at Saint Louis, Missouri, and within the jurisdiction of this Court. The fact that the defendant was notified of such acceptance or ratification by a telegram or letter sent to him at Washington would not alter this result, if the circumstances under which the negotiations were had, and the tentative agreement was made, were such that it can be reasonably inferred that he contemplated and assented to notice of the acceptance of his proposition being communicated to him through that medium."

**This Charge of the Court is Fundamentally Erroneous in the Following Particulars:**

*First.* There was no evidence whatever to go to the jury that Burton made any agreement on November 18, 1902, or at any other time, at St. Louis or anywhere else, to render services to prevent the issuance of a fraud order. All negotiations looking toward Burton's employment by the Rialto Company were had between Harlan, its representative, and Burton, on the train in Illinois on the 17th day of November, 1902; and no part of these negotiations, then or afterwards, were had in the State of Missouri. Harlan and Burton were the only parties to that negotiation on the train, and they were the only witnesses called to prove what took place between them on the train. Both Harlan and Burton testify positively and unequivocally that there was no agreement made by Burton or any willingness expressed by Burton to render any services before the Post Office Department to prevent the issuance of a fraud order. It is not necessary here to go over this evidence at length to prove the correctness of this statement, that having been done in other parts of this argument, and the correctness of this statement appears from the evidence set forth in the record. Furthermore, Harlan was the Government's own witness. So far, therefore, as the negotiations on the train between Harlan and Burton were concerned, no agreement that they made or contemplated covered any services to prevent the issuance of a fraud order.

Presumbably Harlan had some conversation with Dennis as to what took place between Burton and himself on the train. Just what Harlan said to Dennis does not appear. It is a remarkable feature of the Government's prosecution of this case that it offered no evidence whatever by Harlan or anyone else as to what conversation was had between Harlan and Dennis when Harlan returned to St. Louis after having had his conference with Burton on the train. The

record is silent as to what Harlan told Dennis that Burton was or was not to do.

The next thing that occurred was that Harlan wrote to Burton the letter dated November 18, 1902. (record, page 112.)

The trial Court, therefore, having before it the evidence of Harlan and the evidence of Burton, and this letter of November 18, 1902, and having nothing else before it relating to the making of the agreement or the terms of the agreement, made the charge to the jury above quoted, leaving the jury at liberty to find the defendant guilty of having made an agreement to prevent the issuance of a fraud order, although both Harlan and Burton, the only witnesses as to what the agreement was, positively and unequivocally testified that no such agreement was made, and although the letter of November 18, 1902, contains not a shadow of evidence that any such agreement was made. Our proposition, therefore, is that this charge to the jury is fundamentally erroneous, because there was no evidence whatever that any agreement to prevent the issuance of a fraud order was ever made by Burton.

Furthermore, the Court erroneously stated to the jury that *the evidence as to this agreement was conflicting*, when it was not, but on the contrary unequivocal that no such agreement was made or contemplated. The Court also said to the jury as follows:

> "The mere agreement to render the service is not an offense. It is the agreement to receive compensation for the rendering of them which constitutes the offense. It should be carefully observed that the actual rendition of services is not a necessary element of this offense. The evidence is complete and the defendant's guilt is established if the evidence shows he made an agreement to render such services for compensation."

Therefore, under this instruction, the defendant, might, if he made such an agreement on the 18th day of November, 1902, have been indicted on the same day or the next day,

and convicted, although he rendered no service pursuant to such agreement. Accordingly the Court permitted the jury to find Burton guilty on the evidence of Harlan and Burton and the letter of November 18th above referred to. As to this fatal defect of want of evidence as to the alleged agreement to render services to prevent the issuance of a fraud order, the Court stated to the jury as follows (record, pages 260-261):

> "When a controversy arises as to what was the intention or purpose of the parties entering into an agreement, the terms of which are in question, one of the safest and best indications of the true intent or purpose of the agreement is the practical interpretation given to it by the parties while they are engaged in its performance, and before any controversy arose concerning it. Thus, evidence of the actual conduct and acts of the parties relating to the subject matter of that agreement and occurring while they were engaged in executing it, is at times more persuasive and safer evidence of the actual character of the agreement than is testimony coming from the parties after a controversy about it shall have arisen, and at a time when their recollection may be dimmed by the lapse of time, or when the accuracy of their testimony may be otherwise affected. This rule is of especial application in the instance of agreements made in violation of the law where there would be a motive to escape the legal or moral consequences of making such an agreement."

The objections to this charge to the jury are various. *First*, there was here no ground for the application of any such rule, because the only two witnesses as to this contract agree in stating that it did not contemplate or provide for the rendition of services by Burton of a prohibited character before the Department. Therefore there is no ambiguity to be cleared up by any construction put upon the agreement by the contemporaneous acts of the parties.

The *second* objection to this charge of the Court is that there is no evidence to support it. There was no practical interpretation of this contract by Burton rendering any ser-

vice to prevent the issuance of a fraud order, and there was nothing to go to the jury permitting them to infer that he had rendered such services. When the Court therefore said,

> "Evidence of the actual conduct and acts of the parties relating to the subject matter of that agreement and occurring while they were engaged in executing it, is at times more persuasive and safer evidence of the actual character of the agreement than is testimony coming from the parties after a controversy about it shall have arisen,"

it implied that there was in the actual conduct and acts of Burton evidence from which the jury would be justified in inferring that he had made an agreement on the train with Harlan to render prohibited services. The Court gave to this erroneous charge greater fatality by adding that "this rule is of especial application in the instance of agreements made in violation of the law where there would be a motive to escape the legal or moral consquences of making such an agreement."

The evidence and the undisputed evidence of Cochran, the only Post Office official with whom Burton had any conference claimed by the Government to relate to the issuance of a fraud order, is that Burton made no representations with respect to the Houts and Evans complaints, did not discuss any such thing as the issuance of a fraud order, and never did discuss with him the issuance of a fraud order, and never requested that no fraud order be issued. Cochran testified to the same thing as to each and all of the interviews which he had with Burton (record, pages 169-172).

We do not here go into this subject at length, because it is treated in full under Point V of this brief and elsewhere, but we state here briefly that the first visit of Burton to Cochran was concerning the indictment against Dennis; that was the sole purpose of the visit, and that visit was made after Burton received Harlan's letter dated November 18, 1902, (record, page 112), relating solely to Dennis, and did

it, unless A notified B before B mailed an acceptance that he, A, had withdrawn his offer. The rule exists in order to regulate the rights of the acceptor. This is the reason and necessity of the rule, and the rule is limited by its necessity. It does not require the Court to create a fiction such as the trial Court in the present case created, that Burton was in St. Louis, when in fact he was not there, and was in St. Louis, not by reason of his own act, but by reason of the act of another party in mailing the letter of November 18th.

*Second*: However the question may be decided in civil cases under the law of contracts, we submit that in the criminal law of the United States under the provisions of article 3, section 2 of the Constitution, and the sixth amendment, there is no room for any such view as was taken by the Court below in holding that Burton made a contract in St. Louis the moment that Harlan, by direction of Dennis, mailed the letter of November 18th at St. Louis; and the Court erred in holding that under these circumstances the mailing of such letter by Harlan to Burton completed the offense in St. Louis the very moment it was mailed, and that Burton, although actually absent, was constructively present in St. Louis and gave the Court jurisdiction to try him at that place. Observe that under this erroneous view this offense of Burton is *ambulatory*. If Harlan and Dennis had been in Canada and mailed the letter there, under the view of the Court below Burton would have committed no offense, because the letter would have been mailed in Canada and the offense committed there, if anywhere, and that would have been outside the jurisdiction of the United States. And if Harlan and Dennis had been in California and had mailed the letter of November 18th there, the offense would have been committed in California, and the United States Court in California would have had the same jurisdiction over it that the Court asserted in favor of the jurisdiction in St. Louis, and Burton, under that view, could have been dragged to San Francisco to defend himself, as in this instance

he was twice dragged to St. Louis to make his defense, notwithstanding the provisions of the Constitution mentioned, guaranteeing to him the right of trial by a fair and impartial jury in the *state and district* where the offense was committed.

The only sound view is that a person shall be tried where he committed the offense, and if Burton made an agreement in violation of this statute, he was either in the state of Illinois or in the District of Columbia when he made such agreement; he was not in the state of Missouri.

**The Jurisdiction of the United States Court in Missouri to try Burton on the Counts of this Indictment Alleging the Making of an Agreement Cannot be Sustained Under Section 731 of the Revised Statutes, on the Theory that Burton's Offense was Committed Partly in Illinois and Partly in Missouri, or Partly in Washington and Partly in Missouri.**

Said Section 731 of the Revised Statutes is as follows:

> "When any offense against the United States is begun in one judicial circuit and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined and punished in either district in the same manner as if it had been actually and wholly committed therein."

An indictment in the United States Courts must set forth the place where the offense was committed. This is elementary law, and made more indispensable, if possible, by the provisions of the Constitution that a defendant is entitled to be tried in the place where the offense was committed. If the Government claimed that this offense was committed partly in Illinois and partly in Missouri, then an indictment which alleges that the offense was committed *wholly* in Missouri does not state where the offense was committed. The indictment in the present case alleges that the "agreement was made at St. Louis." It alleges (page 12) that

Burton on the 18th of November, 1902, "at St. Louis did agree," etc. There is no allegation of any agreement made in Illinois or of any act whatsoever done in Illinois, nor is there an allegation of any agreement made in the District of Columbia. The plain meaning of the allegation on the face of it is that Burton was in St. Louis in person and made, on the 18th of November, the alleged criminal agreement in that place. When the Government came to the trial of this case it was shown that no agreement was made by Burton in St. Louis of any character, and that the acts which the Government claimed Burton committed in making the agreement, were performed wholly outside of St. Louis, either in Illinois or in Washington. Therefore we say that the Government could not sustain its case on the theory that the making of the agreement was done at least partly in Missouri, and call to its aid section 731 of the Revised Statutes.

**As to the Doctrine of Constructive Presence. Burr's Case.**

The doctrine of *imputed, fictitious or constructive presence* in the alleged locality of the crime by the mere mailing of the letter of November 18th, although the accused was *in fact absent,* would, if applied in this case, be in direct conflict with the Constitution (Art. III, Sec. 1), and the Sixth Amendment securing to the defendant "the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."

The ruling of the Court below calls upon this Court to decide whether the odious doctrine of *constructive criminality* has any application to this case; whether crime has a locality and a person accused has a right to be tried in the place where the acts constituting the alleged crime were committed; whether the offense charged against the defendant is *ambulatory* and is committed in Chicago, London, San

Francisco or St. Louis, depending upon the accident where a particular letter may be mailed, and whether it can be committed in a distant jurisdiction through the fiction of an *imputed, fictitious and constructive presence.*

Why did the Constitution erect the bulwark of personal liberty provided for in the Constitution and in the Sixth Amendment that every person accused of crime shall enjoy the right of *trial* by a jury *in the State and district where the crime was committed?* It was because it was deemed essential to justice that no man ought to be triable or tried except in the place where the acts constituting the crime were actually committed; where the character of the prosecutor and of the accused, as well as of the witnesses, are known, and where the attendance of witnesses for his defense can be enforced. In a country of such vast geographical extent as ours, this established principle of the law of England as to the locality of crime and of criminal jurisdiction was considered of such prime and fundamental importance to the liberty of the citizen that it ought to be safeguarded by the Constitution itself, and the people of this country were not satisfied until this great bulwark of justice and of individual right and liberty was further secured by the specific provisions of the Sixth Amendment to the Constitution.

Section 731, Rev. St., *supra,* is a transcript of the Act of 7 Geo., IV, c. 64, sec. 12, which provides that where an offense is "begun in one county and completed in another the offender may be tried in any of such counties, as for example, a wound in one county and death in another."

Stephen, Digest Crim. Procedure, p. 47 and note, citing R. vs. Jones, 1 Russell on Crimes, p. 8.

The statute on its face is limited to cases "where some of the acts material and essential to the crime and requisite to its consummation occur in one county and some in the other in which case the accused is indictable in either."

12 Cycl. Law & Proc., pp. 239, 240.

underwent the most exhaustive examination to which it was ever subjected, by Chief Justice Marshall in the *United States vs. Aaron Burr.* It was the turning point of that famous case. It was discussed at the bar for days by lawyers eminent for ability and learning, as will be seen by Robertson's shorthand report of the trial. Marshall's opinion in that case has, so far as we know, never been questioned. It is given in full in *Robertson's Report;* also in the *Appendix* to 4 Cranch's Reports, and also in *Marshall's Complete Constitutional Decisions* (by John F. Dillon, pp. 82-165).

The indictment charged Burr with treason, alleging *as the overt act that he levied war on Blennerhassett's Island in the State of Virginia.* The indictment was found and the trial took place in the United States Circuit Court for Virginia.

At the time of the assemblage of men on Blennerhassett's Island, Burr was two hundred miles distant *in another Federal district and State.* It was held that the indictment "could not be supported by proof that war was levied at that place (Blennerhassett's Island) by other persons, in the *absence* of the prisoner, *even admitting those persons to be connected with him in one common treasonable conspiracy.*"

Chief Justice Marshall in his great opinion says:

> "*The place* in which a crime is committed is essential to an indictment, were it only to show the jurisdiction of the Court. It is also essential for the purpose of enabling the prisoner to make his defense. That at common law an indictment would have been defective which did not mention the place in which the crime was committed, can scarcely be doubted. For this it is sufficient to refer to Hawkins, V 2, c. 25, sec. 84, and c. 23, sec. 91. This necessity is rendered the stronger by the constitutional provision that the offender 'shall be tried in the State and district wherein the crime shall have been committed,' and by the Act of Congress which requires that twelve petty jurors, at

least, shall be summoned from the county where the offense was committed.

"A description of the particular manner in which the war was levied seems also essential, to enable the accused to make his defense. The law does not expect a man to be prepared to defend every act of his life which may be suddenly and without notice alleged against him. In common justice, the particular fact with which he is charged ought to be stated, and stated in such a manner as to afford a reasonable certainty of the nature of the accusation, and the circumstances which will be adduced against him. * * *

"That clause in the Constitution, too, which says that in all criminal prosecutions the accused shall enjoy the right 'to be informed of the nature and cause of the accusation,' is considered as having a direct bearing on this point. It secures to him such information as will enable him to prepare for his defense. It seems, then, to be perfectly clear that it would not be sufficient for an indictment to allege generally that the accused had levied war against the United States. The charge must be more particularly specified, by laying what is termed an overt act of levying war. The law relative to an appeal, as cited from Stamford, is strongly corroborative of this opinion. *If it be necessary to specify the charge in the indictment, it would seem to follow, irresistibly, that the charge must be proved as laid.*

"All the authorities which require an overt act require also that this overt act should be proved. The decision in Vaughan's case is particularly in point. *Might it be otherwise, the charge of an overt act would be a mischief instead of an advantage to the accused. It would lead him from the true cause and nature of the accusation, instead of informing him respecting it.*

"But it is contended on the part of the prosecution that, although the accused had never been with the party which assembled at Blennerhassett's Island, and was at the time at a great distance, and in a different State, he was yet legally present, and, therefore, may properly be charged in the indictment as being present in fact. It is, therefore, necessary to inquire whether

*in this case the doctrine of constructive presence can apply.*

"If such evidence would support such an indictment, by *the fiction that he was legally present, though really absent,* all would ask, to what purpose are those provisions in the Constitution which direct the place of trial and ordain that the accused shall be informed of the nature and cause of the accusation?" * * *

And because Burr was actually absent and could not under the circumstances be considered as constructively present on Blennerhassett's Island, although he procured the assemblage at that place, the prosecution failed for want of jurisdiction in the Circuit Court for Virgiana, and Burr was acquitted.

The decision in Palliser vs. United States, 136 U. S. 257, is not in conflict with the foregoing views. The offense charged was an offer of money to a Postmaster to induce him to sell postage stamps on credit. The Postmaster was in Connecticut, the defendant in New York. The offer was made in a letter mailed by the defendant in New York to the Postmaster in Connecticut. The Postal Department was clearly the innocent agent of the defendant in conveying the offer to the Postmaster. The offer to the Postmaster, which was the crime, could be made to him only where he was.

And Horner vs. United States, 143 U. S., 212, proceeds upon the principle of the Palliser case. The offense charged was causing a lottery circular to be delivered in Chicago through the agency of the Post Office. The offense was held to consist in the delivery of the circular and so was held to be committed at the place of delivery, and not at the place of mailing.

The nature of the offense, that which constitutes its turpitude, must be considered in determining the place of its commission.

If the offense were simply discharging fire arms, even though a man aimed across a state boundary, the venue

would be in the state wherein he stood. Where a statute makes it an offense to send letters designed to extort money, the offense of sending is triable only in the county from which the letter is sent. Sands vs. State, 26 Tex. App., 580.

In United State vs. Fowkes, 53 Fed. Rep., 13, the defendant had been indicted with others for exacting from a shipper a less compensation for transportation of freight than was prescribed by statute. The shipment was from St. Louis to New York. The defendant was the agent at Philadelphia of one of the connecting carriers making up the line. He signed the "line voucher" on behalf of his company. The Court said:

> "The appellee was simply the freight claim agent of the Philadelphia & Reading Railroad Company. As such agent, all that it was competent for him to do in or about the transaction averred to be criminal was the signing of a 'line voucher,' and the evidence was to the effect that no voucher which he had any authority to sign could have operated as an allowance of a claim for rebate from the schedule rate. If it be assumed, however, that he did sign an instrument which permitted an unlawful act, yet it is beyond question that whatever he did was done in Pennsylvania, and that his offense, if any, was both begun and completed in that state; and that he did not elsewhere, in any manner, charge, demand, collect, or receive, or cause or permit to be charged, demanded, collected, or received, from any person whatever, an unlawful compensation for the carriage or shipment of property, as in the indictment is alleged. This case differs materially, as to the facts affecting the point under consideration, from those cited in argument. In re Palliser, 136 U. S., 257, 10 Sup. Ct. Rep., 1034, was a case in which the offense charged was an offer of money, or a tender of a contract for the payment of money, contained in a letter mailed in New York, and addressed to a postmaster in Connecticut, to induce him to violate his official duty, and it was held that the offense continued to

be committed in Connecticut. The letter, it will be observed, was mailed directly to, and was received by, the postmaster in Connecticut; and the only doubt intimated by the Supreme Court was as to whether the offense was at all committed before the unlawful proposal became known to the person to whom it was addressed. Horner vs. U. S., 143 U. S., 207, 12 Sup. Ct. Rep., 407, was decided under a statute making it an offense to cause lottery circulars to be delivered by mail. The delivery occurred in Illinois, and the offense was, therefore held (citing In re Palliser) to be triable there. It is necessary only to compare the facts of these cases with that now before this Court in order to perceive the differences which distinguish them from it. In the present case, the utmost that, under the evidence, can be attributed to the appellee, is that he signed at Philadelphia a paper which was not addressed or delivered to the person whom it is said to have unlawfully favored, but in pursuance of which, another person did, or was authorized to do, a wholly independent and distinct thing, namely, to pay a sum of money, and at another place."

The offense charged in this case is *sui generis.* A Senator is prohibited from agreeing to receive compensation for certain services, but nobody is prohibited from agreeing to give him that compensation.

The offense defined by section 1781 R. S. of U. S. differs in this respect from that charged in this case. It prohibits a member of Congress from receiving or agreeing to receive any valuable consideration for procuring a contract or office for any person, and it also prohibits any person from giving or agreeing to give any Congressman any consideration of value on such account.

In U. S. vs. Dietrich et al., 126 Fed. Rep., 664, Senator Dietrich and one Fisher were jointly indicted as for a conspiracy under this statute, the charge being that they had conspired to violate this statute by agreeing, Dietrich to receive and Fisher to pay $1300.00 in consideration that Diet-

rich would procure the office of postmaster at Hastings, Neb., for Fisher.

It was held that the offense defined by the statute was not a conspiracy, and that while both parties to such a transaction were guilty, each was responsible solely for his own act. The Court said:

> "Unquestionably, the agreement or transaction described consists of two distinct and several acts by separate persons. In every executory agreement the promises therein reciprocally given and received are severally the acts of the parties making them, and not of those to whom they are made. This indictment fully recognizes this when it attributes to Dietrich the act of agreeing to receive the bribe named, and attributes to Fisher the act of agreeing to give it. No effort is made to charge either with the promise of the other. In the very nature of things the two acts are several, not joint. The statute is in terms leveled against the several acts of the intended bribe taker and the intended bribe giver, and makes each a distinct and separate offense. While parts of one transaction, the two acts constitute several offenses, for which those by whom they are committed must respond severally, not jointly."

Although under 1781 both parties to the transaction are guilty, yet each is guilty and is responsible only as to his own act. For the stronger reason then in this case, where only one party to the transaction can be guilty, should he be held responsible only for his own act.

Each party to an agreement in truth acts where he is at the time, and if his act of entering into that agreement is a distinct offense, the place of the offense is where he was when he entered into the agreement, and not where the other party was when that other party entered into the agreement, and especially so if in this last act there was no offense by anybody.

If the offense was committed in St. Louis, then something was done in St. Louis by defendant personally or

through an agent, which constituted the offense. The thing done was, so the Court submitted to the jury, the ratification by Dennis of an agreement tentatively made in Illinois by Harlan with Burton. Up to this time there was no offense. But Burton was not present at this act of ratification and he had no agent there. The act was not his and was not done in his behalf. It was the act of Dennis as President of the Rialto Company and done for that Company. And this act of Dennis, consciously, voluntarily and independently done, and not done for Burton, was held to complete the offense by Burton, or rather to make an offense by him when none existed before.

We are not dealing with what Dennis did or with what he intended. And so it is not the place of the contract, but the place of the commission of the offense which determines the jurisdiction in which the trial for the offense must be had. And as Burton acted for himself throughout, as no one was empowered by him to enter into any agreement for him, the act of Dennis in entering into the agreement cannot be taken as the act of Burton done by Dennis as his agent.

The suggestion that Harlan was in any sense the agent of the defendant, and that the defendant acted through him in Missouri, is not tenable. Harlan was the agent of Dennis as President of the Rialto Company, sent out by him and acting for him from beginning to end. The case would not be different if Dennis himself had gone on the train and negotiated with Burton. And had this been so, and Dennis was for any reason unwilling to conclude at that time, and so took the matter under consideration, saying he would advise Burton of his determination, could it be said that while pondering the matter he was the agent of Burton and thinking for him? And when he reached a conclusion and sent notification of that conclusion to Burton by letter or telegram, was he acting as Burton's agent? If so, then

if Dennis had concluded that he would not accept Burton's terms, Burton would not be guilty, while, if he concluded to accept them, Burton would be guilty. And the place of the offense would be where Dennis reached his conclusion as to what he would do, for then the agreement would be consummated. So Burton's guilt and the place of the offense would be determinable by the mental operations of Dennis, and not by anything done by Dennis under Burton's direction and in obedience to his authorization. And in such case, no notice to Burton would be necessary, for the agreement was complete as to both when Dennis made up his mind as to what he himself would do.

The agreement between Burton and the Rialto Grain and Securities Company was not complete on the 18th of November when Harlan's letter was mailed. That letter varied the terms of the negotiation on the train in two respects: *First*, it fixed the date at which the contract should commence as of November 18, 1902. No date had been agreed upon before, and this was a new term introduced into the contract for the first time by that letter. *Second*, but still more important is this: Harlan and Burton's arrangement provided that the contract should be a monthly employment for not less than five months, Harlan assuring Burton that it would not terminate even then; whereas this letter of November 18th makes no such provision, but says: "Accept your terms to act as counsel at a salary of $500 per month, said service to begin immediately, that is, of this date November 18, 1902," containing therefore no stipulation in Burton's favor that his employment should at least last for the period of five months at least. This Court has held that where there is any such change as this, there is no contract unless and until the parties agree to such cange.

Eliason vs. Henshaw, 4 Wheaton 225.

Until Burton received that letter of November 18th, he had done nothing more than express his willingness to en-

neither is bound. * * * A proposal to accept, or acceptance, upon terms varying from those offered, is a rejection of the offer."

National Bank vs. Hall, 101 U. S., 43.

See also, Minn. and St. L. Ry. Co. vs. Rolling Mills Co., 119 U. S., 151.

Chitty in his work on Contracts, 11 Am. Ed. p. 15 note f, says:

"The agreement is not complete until there is upon the face of the correspondence a clear accession on both sides to one and the same set of terms."

When labor or service is involved, time is as essential an element as quality or character.

Christian Co. vs. Bienville Co., 106 Ala. 124.

The letter of the Rialto Company of November 18th, 1902, being then in effect an original proposal, there was no contract until this proposal was accepted by the defendant, and this he did by his letter of November 20th, written and mailed at Washington, and Washington was, therefore, the place where the contract was made.

The proposal of the Company cannot be aided by parol. It does not assume that terms had been arranged between Harlan and Burton, and then simply accept those terms. On the contrary, it states what those terms are, and they constitute, if accepted, a contract of employment by the month. Tennessee Co. vs. Pierce, 81 Fed. Rep. 814. A written agreement thus complete cannot be supplemented by parol.

Seitz vs. Brewers' etc. Co., 141 U. S. 510, involved a contract of sale of a refrigerating machine. The contract was in writing, described the type of the machine, the mode of delivery, price and terms of payment. It was silent as to the efficiency of the machine, as to which it was claimed a verbal guaranty had been made. The Court said:

"Undoubtedly the existence of a separate oral agree-

ment as to any matter on which a written contract is silent, and which is not inconsistent with its terms, may be proven by parol, if under the circumstances of the particular case it may properly be inferred that the parties did not intend the written paper to be a complete and final statement of the whole of the transaction between them. But such an agreement must not only be collateral, but must relate to a subject distinct from that to which the written contract applies, that is, it must be so closely connected with the principal transaction as to form part and parcel of it. And when the writing itself upon its face is couched in such terms as import a complete legal obligation, without any uncertainty as to the object or extent of the engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing. Greenl. Ev. sec. 275.

There is no pretense here of any fraud, accident, or mistake. The written contract was in all respects unambiguous and definite. The machine which the company sold and which Seitz bought was a No. 2 size refrigerating machine as constructed by the company, and such was the machine which was delivered, put up, and operated in the brewery. A warranty or guaranty that the machine should reduce the temperature of the brewery to 40 degrees Fahrenheit, while in itself collateral to the sale, which would be complete without it, would be part of the description and essential to the identity of the thing sold; and to admit proof of such an engagement by parol would be to add another term to the written contract, contrary to the settled and salutary rule upon that subject.

Whether the written contract fully expressed the terms of the agreement was a question for the Court, and since it was in this instance complete and perfect on its face, without ambiguity, and embracing the whole subject matter, it obviously could not be determined to be less comprehensive than it was. And this conclusion is unaffected by the fact that it did not allude to the capacity of the particular machine. To hold

that mere silence opened the door to parol evidence in that regard would be to beg the whole question."

However then we consider the transaction in question, the result is the same. If we are to treat it as a contract, it was concluded at Washington, and so if the place of the contract is the place of the offense, the defendant was entitled to be tried at Washington. But as the offense consists solely in what the defendant did in the matter, and not in what was done by the other party to it, his act, if an offense, is triable only where it was committed.

Every reason underlying the Constitutional provision invoked by us, requires that this question of place of the offense shall be determined upon substantial grounds of fact, and not upon legal fictions.

## V.

## There was no Evidence to Sustain any Count of the Indictment.

Three of the counts charge the defendant with an agreement to receive compensation for services to be rendered in a proceeding pending in the Postal Department against the Rialto Grain and Securities Company, and two with receiving compensation for services rendered by him in such a proceeding.

In the discussion of this branch of the case, we shall take as typical the counts on which the Court pronounced sentence, the sixth and the seventh.

The sixth count charges these several facts:

1. That at the time involved, the defendant was a Senator of the United States from the State of Kansas.

2. That on the 18th day of November, 1902, the Rialto Grain and Securities Company was a corporation of the State of Missouri, and was pretending to carry on the business of a dealer and broker in grain and securities.

3. That there was then pending before the Postal Department of the United States a proceeding in which the United States was indirectly interested.

4. This proceeding was to determine whether the Rialto Company was engaged in conducting a scheme for obtaining money through the mails by means of false and fraudulent pretenses, and whether the Postmaster General should issue a fraud order against the Company.

5. That the defendant then knew this proceeding to be then pending.

6. That the defendant agreed with the Rialto Company to receive from it twenty-five hundred dollars.

7. That this was to be received by him as compensation for services to be rendered by him to the Company in the before mentioned proceeding while it was pending before the Department.

8. That the services to be rendered consisted of his appearing before the Post Office Department, the Postmaster General, the Chief Post Office Inspector, the Assistant Attorney General for the Post Office Department, and other officers of the Department, as an agent and attorney of the Company, and obtaining information for it concerning the proceeding, and by the influence of his presence and of his office as Senator, and by statements, representations and persuasion inducing the Postmaster General to believe that that Company was not conducting such a scheme as that stated above, and so end the investigation and not issue a fraud order.

The first and second of the enumerated facts were conceded or established, except in so far as the indictment charges the business of the Rialto Company to be a pretended one. This, the Court held to be immaterial.

The third has been considered in its legal aspect, viz: whether what was shown to have been done in and by the Post Office Department constituted a proceeding within the

meaning of the law, and we consider it further to determine whether, as a matter of actual fact, anything was pending.

Two complaints had been sent in, one by Mrs. Houts, and one by Mrs. Evans, both of Albany, New York. This, and the immediately succeeding letter of Fravel, which made no complaint and only enclosed some literature, had been sent out to St. Louis to the Inspector in charge, turned over to the man in the field, investigated by him and reported upon by him as unwarranted, before the 18th day of November, and before Burton had met anybody connected with the Rialto Company, and there was never after anything done by anybody respecting these letters. The investigation as to these letters, if not dead, was dormant, and to this day has not come to an awakening. The testimony of Price, the man in the field, is explicit that he had examined the matter and made his report that the charges were unfounded. His Inspector in charge testifies that this report was made to him. The Rialto Company knew of the investigation, was informed of the result, and believed it to be at an end, and acted accordingly. As shown by evidence offered by us, but rejected by the Court, an investigation of the Rialto Company was begun July 27th, 1903, and continued for a month. It had no relation to the Houts and Evans complaints, but covered the period from January 1st to July 31st, 1903. The report of the field inspectors Price and Piatt may be found in the record pp. 216 to 225. They set forth on p. 217 the original organization of the Company and its reorganization on December 31st, 1902, which later organization continued until August 19th, 1903. They say "the period covered by this latter organization is the one also covered by the complaints and by our investigation.' And on page 219: "As stated before, our investigation covered the period from January 1st to July 31st, 1903. This was principally due to the fact that the officials of the original organization had been dismissed

and the books closed, because few complaints existed prior to the beginning of this period."

It seems to be the usage of the Department when a complaint comes in against a person to "jacket" that complaint, that is, put it in a wrapper and give it a number, and thereafter if any other complaints come in, however unrelated to the first, to assign them to that same jacket, and in that way it is contended a proceeding is pending continuously from the receipt of the first complaint.

But we submit that complaints made or letters sent in after November 18th, 1902, do not show a proceeding pending on that day. So that we are to look only to the complaints made before November 18th. These had been actually disposed of on November 14th, and the disposition then made of them stands to this day. If nothing further had transpired respecting the Rialto Company in the Department than this, if only these complaints had been made, and after being so disposed of, the defendant had made inquiry of the Chief Inspector whether there were any complaints, and had been answered that these two had been made and sent to the field, no one would assume to say that the defendant was employed to render service in the Department in a proceeding there pending against the Rialto Company. Nobody would then have questioned, under the testimony in this case, that the employment of the defendant was with reference to the indictment of Dennis and the Securities business of the Rialto Company. The officers of that Company knew, or at least believed, that this "proceeding" was dead. They said nothing to Burton respecting it, and so far as concerned the agreement made with him, it was actually non-existent.

The "proceeding," such as it was, never had any reference to the issuance of a fraud order. All the evidence in the case shows this. Section 44 of the Postal Regulations provides, among the duties of inspectors, that "alleged

violations of law are to be investigated and reported upon by them, and they will, when necessary, aid in the prosecution of all criminal offenses."

Section 1617 of the Postal Laws and Regulations is identical with section 5480 of the Revised Statutes, which has nothing to do with the issuance of fraud orders, and simply provides for the punishment of persons who use the mails in aid of certain defined schemes to defraud.

When the Houts and Evans complaints came in, they were sent out for investigation to determine whether or not there had been a violation of section 1617. They were sent in a jacket or wrapper, which contained this endorsement:

"Subject, alleged fraudulent scheme.
Complaint, Bella Evans, Mrs. K. C. Houts.
Address, 856 3d St., Albany, N. Y.
Date, Oct. 30, '02.
Vio. of Sec. 1617.
By Rialto Grain & Security Co.
Address, St. Louis, Mo.

Washington, D. C., Nov. 7, '02.

Respectfully referred to Post Office Inspector in charge at St. Louis for investigation and report.

W. E. COCHRAN,
Chief Inspector."

There was no proceeding with reference to the issuance of a fraud order. The complaints of Houts and Evans coming in there were sent to Dice with instructions simply, "investigate and report whether these Rialto people have violated section 1617." The investigation might show them to be innocent of all offense. It might give cause to believe that they had violated section 1617, which would be proper occasion for calling the matter to the attention of the prosecuting authorities. It might give cause to believe that a scheme for obtaining money through the mails by fraudulent pretenses was being conducted, in which case the matter would come before the Assistant Attorney General for the Post Office Department, and not until then could it be said that a fraud order proceeding was pending.

As to the fifth fact charged in the indictment, viz: that the defendant knew on November 18th that a fraud order proceeding was pending, there is not only no evidence to sustain the charge, but on the other hand, the evidence is conclusive that he knew nothing of anything existing in the Department until November 20th.

Harlan and Burton are the only witnesses to what occurred on the train. The evidence of both is clear to the effect that Burton was not informed of the existence of any complaints. And Harlan believed there were none. Only two complaints had, up to this time, been made against the Company, and these, he had been informed and believed, had been reported upon as unfounded. From no other source could Burton then have ascertained whether there were complaints or not. He testifies that he was assured there was no trouble with the Department, and would be none. When he got Harlan's letter on the 20th, he went to Cochran's office and inquired concerning the Dennis prosecution, growing out of the Brooks business, and then, naturally and properly enough, inquired whether there were any complaints against the new Company, the Rialto. Cochran did not know, but inquired of his clerk and found two names endorsed on a jacket, but even then did not know what the complaints were. He gave Burton the meager information he had, and Burton at once communicated it to Harlan by letter of that date. Reading the letter of November 18th from Harlan to Burton, that of November 20th from Burton to Harlan and Harlan's reply of November 22nd, the conclusion is irresistible that Burton learned of the matter first on the 20th. Harlan's first letter has not one word about any troubles of the Rialto Company in it. Burton's letter shows that he regards it as something unknown to Harlan, for he gives him such information as he has, and wants to know what there is in the complaints. Harlan assures him that the complaints referred to have

been investigated by the Inspector, "and he found the actions of our Company to be all right, and we are informed, made a report in favor of our Company relative to the same." It is obvious from the correspondence that this was a matter of which Burton then heard for the first time, and for the last time. His mind was set at rest concerning it by Harlan's letter, for it is not again suggested in correspondence or conversation.

Not only was Burton ignorant of the Houts and Evans charges as such, on the 18th of November, but he was ignorant of the pendency of any charges by anybody. If there is any evidence to charge him with knowledge, it can easily be pointed out. If he knew anything of such a matter, he did not derive his knowledge from his inner consciousness. Somebody told him something. *Who was it, and what was it?*

We proceed now to consider the evidence as to services rendered by Burton.

The charge is, broadly stated, that defendant, as agent and attorney of the Rialto Company, appeared before the Department, the Postmaster General, the Chief Inspector, the Assistant Attorney General, and other officers of the Department, and obtained information respecting the proceeding, and by the influence of his presence and of his office as such Senator, and by statements, representations and persuasion induced the Postmaster General to believe that the Company was not conducting a scheme to defraud, to stop the investigation and to refrain from issuing a fraud order.

The Court, by its instruction to the jury, eliminated the element of merely obtaining information, and confined consideration to action of some kind with respect to the proceeding.

As to officials seen by the defendant, the general statement of the indictment concerning "other officers of said Post Office Department" fails utterly. There was no attempt

to show that he saw any other officer than those specified, unless it be the Fourth Assistant Postmaster General, and this was confessedly with reference to the Brooks Brokerage Company books. (Rec. 161 and 162.)

He saw the Postmaster General but once, and this was also with reference to the Brooks Company books. (Rec. 161 and 162.)

Two witnesses, Kaiser and Hubner, say that on Monday, December 1st, he called to see the Assistant Attorney General, and one of them says he did see him, but what the interview was about he does not know, for he was not present. (Rec. 181-184.) The defendant testified that he had no recollection of any such call upon that officer. (Rec. 248 and 249).

There is nothing in any of the correspondence indicating any interview with the Assistant Attorney General, and no occasion for such an interview. There was nothing before that officer to see him about. The Houts and Evans complaints had been investigated, and were dormant, if not dead, and no new complaints had been made, and none were made, until January. The report of the Inspectors Price and Piatt of August 20th, 1903 (Record pp. 216-225) shows the course of things from beginning to end. No complaints sent in to Washington were considered by anybody there. The Postmaster General did not know of their existence, the Assistant Attorney General did not know anything of them, and even the Chief Inspector knew nothing, save that Houts and Evans had made complaint of some kind. (Rec. p. 167.)

As various letters came in to the Department, they were in course of regular routine sent out to St. Louis by the Chief Inspector's clerk, with the regular printed instructions. He did not even consult his Chief. (Rec. p. 103.)

No official in Washington, higher in authority than George M. Smith, the Chief Inspector's clerk, so much as

knew that there were any complaints against the Rialto Company, until November 20th, when the defendant inquired of Cochran whether there were any such complaints. Cochran made inquiry of a clerk, and thus learned that Houts and Evans had sent in letters, and he imparted what he had thus learned to Burton. This was the only ripple in the routine. Cochran never again did anything in the case. As other letters came in, Mr. Smith sent them out to St. Louis in regular order, and nothing was done there until in July, when an investigation was begun, which resulted in a suggestion of prosecution because of things done in the Rialto Company by Mahaney while Dennis was sick, and in a recommendation by the District Attorney, and by the then Assistant Attorney General, that no fraud order issue, and none was ever issued.

The indictment charges that Burton induced the Postmaster General not to issue the order. And the answer is that the Postmaster General never so much as heard of the case. It never reached him in any manner. Nobody in Washington is shown to have dealt with the case in any manner, except the clerks, until long after Burton was out of the field. Mr. Taylor was the Chief Clerk of the Postal Department. He opened all mail coming to the Department, and sent these letters to the Inspection Bureau. Mr. Smith received the letters and sent them out to the Inspector in charge at St. Louis. The inspector in charge sent them to the inspector in the field. And nobody else knew what was being done. This course of events was not ordered by the defendant, and it was not interrupted by him. He never spoke to, he never saw, the Chief Clerk of the Department, the Clerk of the Bureau, the Inspector in Charge, or the Inspector in the field. He did not reach or influence these people, or any of them, through anybody else. There is no claim that they were influenced by aught save rule and routine.

It may be that a fraud order should have been issued upon investigation of the Houts and Evans complaints, it may be that the letters of Warner, Fravel and Allen should have stirred somebody out of rote into efficient action, but after this defendant had disappeared from the stage, when many more letters had been sent in, when conditions in the Rialto Company had become much worse, the District Attorney at St. Louis and the Assistant Attorney General of the Department advised against the issuance of a fraud order—and these same men now prosecute the defendant for preventing that fraud order, when the only thing actually done by him was to cause the Chief Inspector to know that a complaint had been made. But for Burton, nobody in Washington, save the Clerks Taylor and Smith, would have known anything. As to the doing anything or not doing it, or how it was to be done or not done, this was settled by the rules.

Burton did not influence Taylor or Smith, nor did he seek to. He did not know them. They passed on the letters as they came. He did not influence the Inspectors Dice and Piatt, nor seek to. He never saw them. They proceeded as they thought proper. He spoke to Cochran, but it was only to get information, and as a consequence Cochran got the information also. Did he influence Cochran's action? Cochran does not say so. The prosecution does not say so. Cochran enjoys the confidence of the Government, and has been promoted as a faithful servant. Cochran was not influenced. Matters proceeded precisely as they would have done had Cochran not been informed. The prosecution even took pains to develop and to emphasize in their redirect examination of him that he was not the man to see respecting a fraud order or a hearing concerning one. (Rec. pp. 175-176.) And so the elaborate charge of the indictment that Burton was employed to, and did prevent, the issuance

put upon the letter by the Government is contrary to the facts. The so-called arrangement was not, and could not, be anything more than an ascertainment of the usual custom of the Department to give notice to the parties interested. There is no pretense that anybody else was seen or arranged with. The letter must be read in the light of what it relates to, and not extended in significance by bold and bald conjectures of things not proven nor attempted to be proven.

Harlan's reply shows that there was no apprehension of trouble with the Rialto Company. The subject is dismissed by him with the statement that the complaints have been investigated and reported unfounded. There is no allusion to possible or probable hearings. He arranged to meet Burton in Washington on the next Wednesday, and that is all there is of this matter. Never again is it referred to.

The parties met on Wednesday, and were occupied with the consideration of the Dennis trouble. They did not go about the Department, and felt no occasion for going there.

When Harlan returned to St. Louis he found that Dennis had been indicted, and on November 29th sent a telegram to Burton to that effect. On December 2nd he wrote, giving fuller particulars as to the indictment, and added that complaints against the company might be expected in consequence, but that they would deal with each case according to its merits. He said also, "At your end of the line, you will, of course, use your own judgment in handling the situation. We will at all times be glad to observe any request made by the Post Office Department or to submit to any examination that they might direct." Then he recurred to the indictment, saying that when the case was prepared it would be submitted to Burton for consideration, and said they would appreciate it if he could be present and participate in the defense.

The allusion to "your end of the line" is taken by the

prosecution to mean that Burton was to do something in the Department about the expected complaints. But Burton was not enough impressed with this to answer it or to act upon it. He knew that if complaints came in they would come to Cochran's division, but he did not go there to inquire. He never, save at the first interview, asked whether any complaints existed. It is suggested that he saw Gen. Tyner on Monday, but that was before the letter was written, and besides Tyner would not know whether complaints were being made. And in fact there were none. The next letter to come in was that of Arthur M. Allen on January 5th. No trace of any inquiry, no trace of any action respecting these apprehended complaints is found in the correspondence.

December 3rd Harlan wrote again, advising that persons pretending to be Inspectors were making claims and suggesting that they were impostors. The trial of the Dennis case is then considered. About December 9th Burton called on Cochran and asked whether the men referred to were Inspectors, and was informed they were not. Burton so wrote to Harlan, and said "there has gone from this office no instructions whatever about the Rialto Company, and there is nothing in this office against you at this time." Then the trial of Dennis is referred to. Making the inquiry that Burton did, it was natural for Cochran to answer that the men referred to were frauds, that there was nothing in his office against the Rialto Company at this time. There was nothing. The Houts and Evans letters had been forwarded to St. Louis, and nothing else had come in. The interest of any lawyer in a client would be sufficient to induce him to make such an inquiry. It was a proper one for anybody to make. It carried with it information the Government should possess. And it does not bear the semblance of service to prevent the issuance of a fraud order.

Then Dennis came to Washington to confer with Burton

about his case. Passing the Department building on December 15th, they went in and called on Cochran, and Dennis was introduced with the suggestion that he wanted him to see what manner of man he was, and, with manifest reference to the case against him, Burton said that the trouble had arisen from the conduct of the Brooks Company, and that the new Company was endeavoring to do a straight business. At this time the only complaints that had been made were those investigated at St. Louis a month before, and regarded by everybody concerned as disposed of.

Two other visits were made by Burton to Cochran, one on January 24th, 1903, and the other on February 5th. These had exclusive reference to getting back books of the Brooks Brokerage Company, which had been given by Dennis to the Government for its use in the trial against him. The trial was over, and Dennis had been discharged. He wanted the books, and was entitled to them. Good faith on the part of the Government required that they should be returned. These visits had nothing to do with any fraud order, and nothing to do with any proceeding against the Rialto Company.

The foregoing is all the substantive evidence as to anything done by defendant in or connected with the Postal Department. It proves, and can prove, no service of the kind contemplated by the statute, or that charged in the indictment. There was no appearance as agent or attorney in any proceeding nor before anybody charged with the determination of any proceeding. There were no statements, representations or persuasions that could induce the Postmaster General or anybody else to believe anything. The only thing said by Burton which could have the remotest relation to anything in the Department, known or unknown to him, was the merest incident to the Dennis case, that his troubles grew out of the Brooks Company and Brooks'

management of it, and not out of his Company or his conduct.

This could not influence any man, unless he was subject to be influenced by his own conjecture that the defendant desired him to do an improper thing. The only thing Cochran could do was to obstruct the investigation, to act corruptly and consciously so, for he had no authority to decide upon the case at all. To assume that any such influence was exerted is unjust alike to Burton and to Cochran. There is no hint in anything that was said about discontinuing investigation. Over and over Cochran states that Burton did not assume to know anything of the merits of the complaints, made no representations respecting them, never asked that a fraud order be not issued, and never discussed such a thing as the issuance of a fraud order. See Cochran's testimony, pp. 167-168-175. Nor does Cochran's testimony signify that the defendant refrained simply from speaking of a fraud order in terms. He says that he never informed the defendant of the complaints made after those of Houts and Evans. And the defendant never again made inquiry as to whether complaints had been lodged against the Company. (Rec. p. 173). And having been informed of the mere fact that the Houts and Evans complaints had been made, the defendant made no request "for any information, or action either, * * * and never did." (Rec. p. 174.)

As to testimony which may be claimed to be in the nature of admissions, there is the latter part of the interview of February 5th, as to which the recollection of Cochran must be distorted, as he assumed the Brooks Brokerage Company affairs to be those of the Rialto Company, and the practice of the defendant in the Dennis case to be practice in the Department. Nothing done in the Department, save getting back the Brooks books, could possibly be construed as practice and Cochran had in mind as the subject of the conversation something that did not exist.

The telegram of Mahaney on February 25th and the reply of defendant on February 27th, relate smply to an inquiry as to whether Inspectors had been sent out, and the answer was that none had been. It involved at most an inquiry by Burton whether anything was pending, and the information to him that there was not.

Mahaney's testimony as to the interview with Burton is, as to its essential features, denied by Burton. But what is more to the purpose, it contains not a word respecting anything done by Burton which can add to or take from the force of the substantive testimony.

The testimony of Brooks is that of a man under conviction of crime, played upon by hopes and fears, and moreover, filled with resentment because of the way in which he figured in this case. He says that one Kastor said in his presence and in the presence of the defendant, and having reference to the defendant, "Here's the man who has defeated you in your fight against Dennis and stopped the issuance of a fraud order." The defendant denies that any such statement was made. The time of this alleged statement was in the early part of January, 1903. Dennis had not yet been tried, and Brooks had not attempted to secure the issuance of a fraud order against the Rialto Company. Every letter sent to the Department which is in evidence shows that it was sent on the writer's own initiative. Houts and Evans feel that they have a grievance, and seek redress. Warner objects to the "gamble in grain," and so through the list. The statement, even if made, was a false statement. The only report that would go against the issuance of a fraud order was that made by Price before Burton came upon the scene, and no complaints, other than those investigated and reported upon by Price, came into the Department until January 5th.

The newspaper interviews introduced in evidence add

nothing new. They are simply characterizations of what had been done. They stated nothing as having been done which was not fully testified to by Cochran and Burton. They both make the Dennis indictment the central feature of the case.

The interview with Cochran in March, 1904, like that with the newspaper men, leaves the question of what the defendant did precisely where the substantive testimony leaves it. At the time of this interview, Cochran was under the impression that the matter of the Brooks Company books was an affair of the Rialto Company.

Support for the indictment must be found somewhere in the five calls upon Cochran. There is no tangible suggestion as to anything done at any other time, and as these do not show anything beyond a simple inquiry as to the existence of charges made of an officer who had no authority to pass upon them, and who was not requested to take any action concerning them, we submit that the defendant neither prevented the issuance of a fraud order, nor attempted to do so.

At the close of the testimony for the Government and again at the close of all the testimony, the defendant requested an instruction for a verdict of not guilty, generally, and specifically as to each count. The Court erred in refusing this request, because the evidence disclosed that it had no jurisdiction of the case, and because the evidence also showed that there was no proceeding pending in the Department, and that the defendant had rendered no services for the Rialto Company which were prohibited by law and had made no agreement to render any such services.

The Court erred also in the instructions which it gave to quests of the defendant numbered 1, 2, 5, 11 and 12.

VI.

**The Agreement of Defendant with the Rialto Company was by the Month, and No Service in the Department Having Been Rendered by the Defendant During the Period Covered by the Payment Made March 26th, There was No Offense in the Receipt of That Payment.**

The Court refusel to direct a verdict of acquittal on the third and seventh counts, and also refused to give the following instruction requested by the defendant, viz:

> "If the jury find from the evidence that the defendant was employed by the Rialto Grain and Securities Company by the month, at a salary of five hundred dollars per month, for a period of not less than five months, and that for the month covered by the payment of March 26th, 1903, he rendered no services in the Postal Department in any proceeding there pending looking to the issuance of a fraud order order against the company, then they should find the defendant not guilty on the third and seventh counts."

Harlan testified (Rec. p. 131), that

> "He (Burton) thought he should receive five hundred dollars a month. To that I made no reply; but continuing he said, 'I don't think I ought to be shut off, however, at the end of a month; for instance, I would not want to go down and try that case, should Major Dennis be indicted, and then have this employment shut off.' He says, 'I think it ought to continue for at least five months.' I replied, 'Why, certainly, that is only fair.'"

Burton testified (Rec. p. 234):

> "When we came to the subject of fees, he asked me what I considered right as a salary per month. I don't know just how I got at it, but I think I mentioned $500 a month; and after some dickering backwards

and forwards, or waiting, I don't remember which, he seemed to be satisfied. I said, 'Now, Mr. Harlan, of course I don't want the responsibility of a case, or helping in a case of this kind'—I am trying to remember just the words there I used.

Q. Give the substance of it? A. At any rate, 'I don't want to be retained in a case of that kind, for a man who was rich, for $500. The case might pass off within a month.' He said, 'Oh, that is not contemplated at all, Senator. You can help us in this other matter that we intend to come up; and as to that matter, time can be mentioned.' Whether he mentioned it or I did, it was to be $500 a month for not less than five months. And he made the remark, 'It will not terminate then unless you terminate it.' No—so far as I remember, that was the substance of what was said.

When I parted with him that night he said he had no authority to contract, but he would recommend that I be employed. And if it was decided to employ me he would come on to Washington for a full conference."

Following this conversation, Harlan wrote to Burton on November 18th, "this company accepts your terms to act as counsel at a salary of $500.00 per month; said service to begin immediately, that is of this date, November 18th, 1902," and Burton responded on the 20th, "In return, if agreeable, you may make remittance for my first month's pay."

This is all the evidence in the case bearing upon this phase of the agreement.

The payment of March 26th was on account of the month beginning March 18th. There is no evidence whatever that Burton rendered any service of any kind for the company during this month.

The agreement between the parties, whether it was to run for five months or from month to month, was severable, alike as to the obligation to pay and the obligation

to render service. The salary of five hundred dollars per month was payable for the service of a month, and, being paid, there was no further liability on account of that month. If Burton had quit the service of the Company on the 17th of December, he would not be entitled to any more pay, because he had worked but one month, and had been fully paid for it. Had the Company broken the agreement on the 17th of December, assuming that it was for five months, Burton would be entitled to recover for the subsequent months only in the event that he was ready and willing to perform service during those months. The contract is severable when one agrees to work for a definite term, as a year, at wages payable weekly, monthly or quarterly.

Davis vs. Preston, 6 Ala., 83.
Matthews vs. Jenkins, 80 Va., 463.
La Coursier vs. Russell, 82 Wis., 265.

In Davis vs. Preston the case was assumpsit upon a written agreement for Preston's services as superintendent of Davis' mills for one year, $300.00 to be paid at the expiration of six months and $300.00 at the expiration of the year. The breach assigned was that defendant had not paid the sums of money, or either of them. The Court said:

> "The defendant then insists that no recovery against him could be had, unless the service was performed for the entire time; and that plaintiff's abandonment of his service previous to the expiration of the year prevented any recovery in the action as brought. This view of the contract cannot be sustained. It is true, the agreement of the plaintiff was to serve until the expiration of the year; but defendant was to pay him one-half in June, and the balance in January afterwards. It may be conceded, therefore, that no recovery could be had for the last payment, and yet the right to recover the first would not be affected. * * * The case is not different from that of an agree-

> ment to pay a given sum in installments; and in such, cases, when the consideration of the payment is service, it is only necessary to show a performance *pro rata*. (Cunningham vs. Morrell, 10 Johns., 203.) A contract for the payment of distinct sums at different periods is very much in the nature of distinct contracts, and an action of debt for each one will lie as it becomes due. (Faw vs. Marsteller, 2 Cr., 24.)"

This Court in Benedict vs. United States, 176 U. S., 357, said that

> "the word salary may be defined generally as a fixed annual or periodical payment for services, depending upon the time and not the amount, of services rendered."

Take what view of this case we may, it is clear that the defendant was not employed exclusively to render services of the kind which would make the employment illegal. He was expected to do other things, and did other things. This was recognized by the Court in its instructions. The jury were told that service with respect to the Dennis case and the Brooks books would not support the indictment. The only thing shown to have been done after December was with reference to the Dennis case and the Brooks books. So far as periodical compensation is related to service, it must be related to the service rendered during the period. There is not even a fiction of law that a man being employed for a year at a stipulated sum per month, that each months' pay is compensation for every month's service.

We moved for a verdict on these counts, and as to this point the Court ruled:

> "The contract, while for convenience providing for payment of the compensation in monthly installments, was not divisible in the sense suggested, but was an entirety, and each payment thereunder was to be in part consideration for the entire service." (Rec. p. 286).

We submit that if the Court was right as to the effect of such a contract, it was still a question of fact for the jury to determine whether any such contract had been made, and by our twelfth instruction we asked that the question of fact be submitted to the jury, but this was refused.

The Court in effect, by submitting the case as it did, determined what was exclusively for the jury, that the agreement between Burton and the Company was not what it purported to be, but was a mere pretext and cover for paying twenty-five hundred dollars for certain services in the Department.

The ruling of the Court that employment for a fixed term at a stated salary per month is an entirety, both as to service and compensation, that is, every dollar of payment stands as compensation for each and every act of service, can have no place in a case like this, for it would lead straight to a violation of the Constitutional provision that no person *shall be subject* for the same offense to be twice put in jeopardy.

The receipt of compensation in itself is no offense; it must be related to and combined with the rendition of a certain service. The one is as much an element of the offense as the other. The employment of the defendant might as well have been for five years as for five months, and then if during the first month he had done one act of the inhibited kind, and never another, if during the rest of the five years, every service rendered by him was lawful and proper, still, as the first month's service was every month being compensated anew, as on the last day of his long term he was still getting pay for his first day's work, so he, every month, would commit his offense afresh and incur a new penalty for his guilt. He had done just one wrong thing, and in doing that wrong, had committed a crime, and then he had gone on month after month for

sixty months *repeating the crime, but without repeating the wrong.*

Such a result does not commend itself to the sense of justice. It makes a person subject for the same offense to be many times put in jeopardy. The Government, on the trial of the first indictment, put this defendant five times in jeopardy of the same transaction, undertaking to make a distinct and severable offense of each and every receipt of compensation taken in connection with the same act of service. This Court has decided that this may not be done, in the case of Hans Nielsen, 131 U. S. 188, saying:

> "It seems to us very clear that where, as in this case, a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense."

The compensation received by defendant in the City of St. Louis on March 26th, 1903, was for the monthly period beginning March 18th. It is not pretended that he was near the Department or any Department officer during that time, or that he did aught that can be construed into the rendition of service.

During this month, March 15 or 18, to April 15 or 18, 1903, for which the month's pay of $500 was made in cash to Senator Burton, no services whatsoever before the Post Office Department were performed by Senator Burton for the Rialto Grain and Securities Company, and there is absolutely no evidence whatsoever showing or tending to show any such services during that month, nor any such services whatsoever after February 27, 1903. On the contrary the evidence shows affirmatively that there were no such services.

There can be no doubt that each month's pay was for each month's services. Suppose, for example, that at the end of the second month's service, say January 15 or 18, 1903, Senator Burton had died; his executor could not for a mo-

offenses, and the defendant be tried and punished for each?

The statute provides that

> "No Senator * * * shall receive or agree to receive any compensation whatever, directly or indirectly, for any services rendered or to be rendered to any person, either by himself or another, in relation to any proceeding. * * * Every person offending against this section shall be deemed guilty of a misdemeanor, etc."

One offense, and but one, is defined by this statute, which, however, may be committed in various ways.

The offense is committed by agreeing to receive compensation for services rendered, although the compensation is not in fact paid. The evil contemplated by the statute and guarded against by it, the interference by a Senator under the stimulus of personal gain, with the orderly operations of the Department has been done.

And so if the compensation has been paid, and the services are not in fact rendered, if it has been agreed to render them, there has been a positive wrong committed. The forbidden fruit has been enjoyed by the Senator, and the integrity of Department operations has been seriously menaced.

Whether, if the transaction does not pass beyond mutual promises, on the one side to pay and the other to serve, and is then abandoned, no act in performance of either promise being done, an offense is committed, we need not here consider, but we do not believe there would be.

But surely, each step in the transaction, where it is completed, as where the agreement is made and performed on each side, is not a distinct offense. If so, then the transaction might be split up into, (1) the agreement to receive compensation for services to be rendered, (2) the agreement to receive compensation for services rendered, (3) the receipt of compensation for services to be rendered, and (4) the receipt of compensation for services rendered.

The agreement inheres in every completed transaction as

a part of it, just as an assault inheres in a battery. To launch the blow is an assault, and if it reaches home it is a battery. But there are not two offenses in the latter case. There is but the one offense in either case, and there may be conviction of a simple assault under the charge of assault and battery. That the assault is effective may be a matter of aggravation, but does not make a new and additional offense.

2 Bishop's New Criminal Procedure, Sec. 55.

If the indictment in this case had charged in a single count that the defendant agreed to receive, and did receive, compensation for services to be rendered and rendered by him, it would not be bad for duplicity. This was in fact done by necessary implication in the original indictment in the former case, and the very evidence here offered to prove the charge of two offenses was there offered to prove the charge of one. The law governing the case is thus laid down in 1 Bishop's New Criminal Procedure, Sec. 436:

> "A statute often makes punishable the doing of one thing, or another, or another, sometimes thus specifying a considerable number of things. Then, by proper and ordinary construction, a person who in one transaction does all, violates the statute but once, and incurs only one penalty. Yet he violates it equally by doing one of the things. Therefore the indictment on such a statute may allege, in a single count, that the defendant did as many of the forbidden things as the pleader chooses, employing the conjunction *and* where the statute has "or," and it will not be double, and it will be established at the trial by proof of any one of them."

A statute of Missouri punishes "every person who shall wilfully set fire to *or* burn any dwelling house, etc." In State vs. Jones, 106 Mo., 302, the indictment charged that the defendant "did set fire to *and* burn, etc." It was contended that the indictment was double, charging the two

offenses of setting fire to and burning the building, but this contention was overruled.

The claim of the Government here is that the defendant made an agreement with the Rialto Company to render certain services for a certain compensation, and that in pursuance of this agreement, and in performance of it, he rendered the services and received the compensation. Here was one transaction and one offense. This involves all the various means mentioned in the statute, and while proof of any one of them would have sustained the indictment, proof that all the means mentioned were employed showed no more than that there was one violation of the statute and one penalty incurred.

All the proceedings below treated the alleged agreement to render services as one offense, and the rendition of the alleged services as another offense, and accordingly the Court rendered separate judgment and sentence on the *sixth* count for the alleged illegal agreement, and on the *seventh* count for the alleged illegal services, imposing a separate fine in each case and a separate punishment. On the same principle this offense could have been split up into four.

This course of procedure is contrary to the rules of Criminal Procedure and also to the provisions of Sec. 1035 of the Revised Statutes of the United States, which reads as follows:

> "In all criminal causes the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offense so charged; *Provided*, that such attempt be itself a separate offense."

VIII.

**The Juror William V. Jones Had an Opinion on the Merits, Formed by Reading What He Believed to Be Correct Reports of the Former Trial, and the Challenge to Him Should Have Been Sustained.**

The examination of Mr. Jones may be found on pp. 37, 38, 39, 40, 41 of the record. It showed that he was present in the city during the former trial and read the evidence as it was reported in the newspapers from time to time. He had "an opinion as a result of the other trial," and this was "predicated on the evidence as presented in the newspapers from time to time." "And upon a similar showing, he would have, naturally, the same opinion." He recalled what that opinion was. He could not put it out of his mind, and it would have the same influence that any other opinion he possessed would have.

To the Court he answered that he did not know the defendant, was not conscious of having talked with any witness in the case, and that his opinion was based entirely upon newspaper reports. The further examination of the juror by the Court was as follows:

> "Q. Did the reading of the newspaper reports produce in your mind the conviction that that which was there stated was true, or was the opinion which you formed one to the effect that if what was stated in the newspapers was true, then your opinion in the case would be along some particular line? A. If the report in the newspapers was correct, I had formed a certain opinion.
>
> Q. Have you now an opinion, or conviction, as to whether the statements in the newspapers were correct? A. Well, I believe them to be correct.
>
> Q. Do you understand that there is a mere newspaper report of the proceedings here? A. Yes, sir.
>
> Q. And that in all probability is not a perfectly ac-

curate and complete statement of the evidence as presented at the trial? A. That was the impression I had at the time that the statements reported in the newspapers were in the main correct. I did not pay any particular attention to reading the reports afterwards.

Q. Were you taking a particular interest in the case at that time? A. No, sir.

Q. What do you say now as to whether you can enter upon the trial of this case and be governed by the evidence as it shall be delivered by the witnesses, and by the law as it shall be stated to you by the Court? A. I believe I could give an impartial judgment in connection with it, except that I might be unconsciously influenced by what happened before, what I had read in the newspapers previously as to what took place at the other trial; but only in that respect.

Q. It is the law that on the trial of this case the defendant is presumed to be innocent, and that the Government must now, by the evidence here to be presented, establish the guilt of the defendant beyond a reasonable doubt. It is the law that no matter of rumor or report or other unreliable and loose matter can be at all considered.

So I ask you, can you enter upon the trial of this case, and give to the defendant, in the beginning and during the trial, the presumption of innocence to which he is entitled, save as it may be overcome, if it is, by the evidence here presented? A. Yes, sir, I believe I could.

Q. And do you or do you not believe that you can rest your verdict, therefore, upon the evidence here presented, when viewed in the light of the law, as it shall be given by the Court? A. I believe that I could give an impartial opinion, irrespective—except that I might be influenced unconsciously by the other.

Q. Are you conscious now of any opinion or inclination in the case which would tend to prevent you from rendering a verdict solely upon the evidence and the law as it shall be given you by the Court? A. No, sir."

The defendant was deprived of a substantial right re-

garding his peremptory challenge by the overruling of his challenge, as he was entitled under the express words of the Sixth Amendment of the Constitution to have rendered to him a panel of *impartial* jurors, under the rule laid down by the Court before being required to make his peremptory challenges.

This Court in Lewis vs. United States, 146 U. S., 370, speaking by Mr. Justice Shiras, says:

> "The right of challenge comes from the common law with the trial by jury itself, and has always been held essential to the fairness of trial by jury. As was said by Blackstone and repeated by Mr. Justice Story: In criminal cases, or at least in capital cases, there is *in favorem vitae* allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors without showing any cause at all, which is called a peremptory challenge; a provision full of that tenderness and humanity to prisoners for which our English laws are justly famous. This is grounded on two reasons; As everyone must be sensible, what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another; and how necessary it is that a prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him; the law wills not that he should be tried *by any one man* against whom he has conceived a prejudice even without being able to assign a reason for such dislike. 2. Because, upon challenge for *cause shown*, if the reason assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment; to prevent all ill consequences from which, the prisoner is still at liberty, if he pleases, peremptorily to set him aside."

The right of peremptory challenge is a valuable right, and if the defendant is forced to expend this peremptory challenge upon a juror who should have been excused for cause, then he is deprived of the right to exert this peremptory challenge against other jurors, who he is im-

pressed would not be impartial, but cannot show cause therefor.

The Juror Jones repeatedly states that he has formed an opinion as to the guilt or innocence of the defendant; that at the time of his examination he had that opinion; that it was predicated upon reports of the testimony at the former trial, would necessarily attend him in the jury box, and that he could not put the opinion out of his mind; that it would have the same influence any other opinion he possessed would have; that he believed the newspaper reports of the testimony at the last trial to have been correct, and under examination by the Court states: "I believe I could give an impartial judgment in connection with it, *except that I might be unconsciously influenced by what happened before.*"

The entire examination of this juror indicates that he was in a state of doubt as to whether he could become an impartial juror; that he was in a state of doubt as to whether his prior opinion could be eliminated, or whether it would affect his verdict.

In the case of Williams vs. United States, C. C. A. 9th Ct., 93 Fed. Rep., 396, it appears that a juror had formed an opinion, and, replying to the following question by the Court: "Do you think you will be able to sit as a juror and return a verdict based solely upon the evidence that you would hear? the juror answered: "I am not infallible. From what I said I think I would. I think I possess a natural sense of justice, I think I would; I feel that I might."

The same state of uncertainty appeared to exist in the mind of Jones in his examination in this case that appeared in the mind of the juror in Williams vs. United States.

Commenting upon the answers of the jurors in the Williams case, the Court says:

> "Certainly this answer also indicated a decided doubt in the mind of the juror whether he would be able to

disregard the strong prejudice derived from his discussion of the case with the defendant's former attorney therein, and be controlled solely by the evidence introduced on the trial. *The law does not, and cannot, deem such a juror impartial.*"

That Mr. Jones would endeavor to do justice, that he would, so far as in him lay, decide alone upon the evidence produced at this trial and the instructions of the Court thereon, we may well believe, and so we might believe of the juror Koehler, challenged by the Government and excused by the Court. The difference between talking with a witness and reading the evidence cannot be very great.

The suggestion of the Court, and a suggestion from the Court in such cases comes with great weight, that the newspaper report was "in all probability not a perfectly accurate and complete statement of the evidence as presented at the trial" was, we say it with due respect, hardly fair. The juror himself believed it was correct, and had an opinion formed in that view.

As it was not competent to bring in those reports and compare them with the record of the trial, the only presumption that would aid in getting an impartial panel, was that the reports were correct, and hence that the juror had an opinion based upon a reading of all the evidence, an opinion of which he could not rid himself, and which he would adhere to from beginning to end, the evidence being substantially the same.

The Court's suggestion was calculated to depreciate the juror's estimate of his opinion in its relation to his qualification to sit in the case, without diminishing the force of the opinion itself, and so to lead the juror to believe himself qualified in the judgment of the Court, despite an opinion formed upon a consideration of all the testimony in the case.

IX.

**The Contents of the Letters of Houts, Evans, Allen, Warner and Fravel, were not Competent Evidence in the Case, as they Related to Matters which were Immaterial, and which, Therefore, the Defendant could not Rebut.**

Objections were made and exceptions saved as to each and all of these letters, and error was duly assigned, but for convenience they can be well considered together.

These letters and accompanying circulars and booklets were read in full to the jury, and they occupy the record from page 48 to 87 inclusive.

The Court, it is true, told the jury when the first letter was offered that this, and others which would follow, was admitted "only for the purpose of showing that there was a proceeding pending before the Postmaster General in respect to whether the Rialto Grain and Securities Company was abusing the mail privilege, within the meaning of the charge of the indictment. The letter is not admitted in evidence for the purpose of establishing the truth of that which is stated in the letter, because that is a matter foreign to our present inquiry." (Record p. 49.)

The present inquiry, as bearing on which the letters were received was, whether there was "a proceeding pending before the Postmaster General in respect to whether the Rialto Grain and Securities Company was abusing the mail privilege."

Assuming for the present purpose that what existed constituted "a proceeding pending," what was necessary to show it?

It was contended by the Government that the defendant was advised that there was a proceeding pending when he was informed by Cochran on November 20th that complaints had been received by the Department from Houts

and Evans, and that these had been sent to the Inspector in Charge at St. Louis for investigation. If this was sufficient to advise the defendant, it was sufficient to advise the jury. If this fact, which was all that the defendant learned, charged him with knowledge of the pendency of a proceeding, then, this fact being proven, the pendency of the proceeding was proven. This fact was proven by the evidence of Taylor, Smith, Cochran, Davis and Price, and by the original and the carbon jackets. The evidence of these witnesses and of the jackets proved that the Government had the matter under investigation.

Under the issues presented by the indictment, and as construed by the Court, it was open to the defendant to show, if he could, that no letter had been received by Taylor and sent by him to the Bureau of Inspection; that no letter was received by Smith and jacketed by him and sent to Dice; that Cochran never told him that any letters had been received and sent out to St. Louis; that no letters were ever sent to St. Louis and that no investigation was ever made there.

And it was not open to the defendant to show that the letters were not true; it was not open to him even to show that they were not genuine. If the letters had been forgeries if no such persons as Houts and Evans existed, still if somebody wrote those letters and sent them in, and the Department acted upon them, in the view of the Court below there was "a proceeding pending."

By the reading of the Evans letter, the jury were told that Mrs. Evans had sent thirty dollars to the Rialto Company for investment, and the Company had not acknowledged receipt of it, and refused to answer her letter of inquiry.

By the reading of the Houts letters, the jury were told that Mrs. Houts had been swindled by the Company out of fifty dollars she had sent on the promise of great gains

therefrom, which she had intended to use to pay the expenses of a visit to her son, who was serving in the Philippines as a member of the Eighth Cavalry.

Of these facts Burton had never been advised, they were immaterial to the issue, and could not therefore be controverted, but they necessarily were prejudicial to the Rialto Company and to everybody connected with it in any manner.

Then came the Allen letter, with a circular setting forth inducements for speculative dealing in corn, and a pamphlet entitled "Golden Gain from Golden Grain," which very greatly elaborated the matter of the circular.

Of the existence of this letter, circular and pamphlet, the defendant never had any knowledge.

January 17th, 1903, Mrs. Warner writes, and she protests against "the whole gamble in grain and food stuffs," and thinks those who conduct it should "receive the same justice allotted to Card Sharpers and Green Goods men, who are Christian gentlemen beside them." She also sent a copy of a pamphlet entitled "Great Oaks from Tiny Acorns Grow," in which it is shown how by speculative dealing in grain, great fortunes may be made.

Of the existence of this letter and booklet the defendant had no knowledge.

Fravel also wrote a letter, enclosing a circular advising him to speculate in corn, and he in his letter thinks it is a case of fraud because, upon the plan of dealing suggested, the Company may claim that orders were not mailed in time to catch the market at the favorable point.

Of the existence of this letter and circular the defendant had no knowledge.

This "literature" assumed to give much and interesting information concerning corn. The reader was told that the area for corn production was ascertained and limited; that the uses of corn were continually increasing in number

and extent; and that the tendency of the price must therefore be upward. All this may be true, and in itself is not to be characterized as a fraudulent representation. The reader was also told what is certainly true, that mere working and saving is a slow way of making money, and that the great fortunes are the result of speculation and investment. The prices of corn in the recent past are stated, showing marked fluctuations, followed by mathematical demonstrations, that great profits would have been secured by the reader had he been in the market, and always on the right side of it, at the time of these changes. Examples then are given of persons who were in the market and who, beginning with small amounts, by reinvesting their gains realized very great profits. This is set forth to illustrate that what rich men do with large sums of money used in speculation, can be done by the poor in comparative measure with small sums.

There are some very good people who believe that extensive speculation upon our Boards of Trade is entirely proper; there are others, very good people also, who agree with Mrs. Warner in denouncing "the whole gamble in grain and food stuffs;" and of the first, who believe it to be proper enough when conducted upon a great scale by people who can afford it, many still believe it to be bad when carried on in a small way by people who cannot afford to lose what they venture, just as there are many who while they believe that if it is not a positive virtue, it is at least a social grace and accomplishment to drink costly wine at a beautiful festal board in a mansion, still believe it is a great wrong to drink cheap liquor in a groggery. These pamphlets pointed the way to speculation upon a small scale, and incited to it by alluring statements of the gains possible to be made.

This could not be met by the defendant in any way. He would not be permitted to show, if he could, that the state-

ments in these pamphlets were true; he would not acquit himself by persuading the jury, if he could, that the business described was fair and lawful, it was not even open to him to show that no such "literature" was ever sent out by the Company, but there it was in the case against him for every evil influence that its extravagant rhetoric could exert upon the minds of the jurors who thought either that "the whole gamble in grain" was wrong, or that the gamble by small people upon a small scale was wrong.

The inferences insisted upon were that in ordinary and regular course, a vigorous investigation would speedily follow upon such a showing as this to the Department, and as months passed and nothing was done, there must have been some sinister influence at work obstructing inquiry and preventing the issuance of a fraud order. Then too, the mere association of this with the defendant was hurtful, none the less that he never saw a line of it all. It puts a taint upon the Rialto Company, and, through the contact enforced in this case, upon the defendant himself.

It was not within human power to limit the thirty printed pages of this testimony, and which it took hours to read, in its effect to proving simply that complaints of some kind had been received and that an investigation had been directed. The nature of the complaints was impressed, strongly impressed, upon the minds of the jurors. How were they indeed to escape it, not trained to distinguish between the material and the immaterial, when by counsel upon the hearing of the first case before this tribunal, this very "literature" was presented in his brief as proof at least tending to show guilt. If the Government's representatives believed that the "bucket shop," "small speculative ventures," "speculative craze," and "company's dupes" features of this evidence were significant, then we may assume that the jury believed them to be so, and as they were immaterial to any issue the defendant was called upon to meet, or would be permitted to meet, they should not have been admitted in

evidence. They were not essential to prove any pertinent fact, they related to no averment in the indictment, save that cunningly phrased one that the Rialto was *pretending* to carry on the business of buying, selling and dealing in grain and securities * * * on its own account and as agent for others."

Tappan vs. Beardsley, 10 Wall, 427, was a suit for libel. The plaintiff offered, and was permitted, to read in evidence the record of a divorce suit brought by the plaintiff's wife against him, the answer and depositions of which reflected upon the defendant in the libel suit. The only thing relevant, if anything, was the fact that a divorce suit had been instituted. Mr. Justice Miller, speaking for the Court, said:

> "The effect of this in aggravating the damages to be recovered is too plain to require comment. And yet Tappan was no party to that suit; had no right to control or influence the making of that record; could not cross-examine the witnesses, all of whom were Beardsley's, nor take any exceptions to or contradict Beardsley's answer. It is difficult to conceive upon what principle the record of that suit was admissible for any purpose whatever in the trial of this one. If the defendant had introduced any evidence to show that a suit for divorce had actually been brought, in support of his statement that there was a rumor that it would be done, then it might have been competent for the plaintiff to show when it was instituted, as some evidence that no such rumor existed when Tappan so reported. But it does not appear that Tappan attempted to show in this suit that the divorce suit had ever been instituted. All that comes from the plaintiff; and it is difficult to see what relevancy it had to any issue before the Court. If, however, a state of case could possibly have existed to justify the introduction by the defendant of that record for that purpose, it could be used for no other, and the answer of Beardsley and the depositions of the witnesses were not only irrelevant to the issue then being tried, but they were forbidden by other well established rules of evidence."

Everything of evil connected with the so-called "proceeding" however irrelevant, was read in evidence in full against the defendant, but when something was offered that would have a good effect, it was excluded.

X.

**The Endorsements on the Jacket Subsequent to March 26th, 1903, the Report of Inspectors Price and Piatt of August 20th, 1903, and the Letter of Assistant Attorney General Robb of September 9th, 1903, were Competent and Material Evidence for Defendant to Disprove the Charges of the Indictment that he had Agreed to Induce, and Had in Fact Induced, the Postmaster General to Issue No Fraud Order Against the Company and to stop investigation of it, and also to Show that the Investigation Being Made by the Department was with Reference to the Indictment and Prosecution of the Officers of the Rialto Company.**

The charge of the indictment is that the defendant by the influence of his personal presence and official station and by his statements, representations and persuasion, induced the Postmaster General to believe that the Rialto Company was not conducting a scheme to defraud, such as that described.

To support this allegation, the Government offered evidence which certainly did not directly prove it, as it did not show that the defendant had ever seen the Postmaster General respecting the matter, or any one else who had anything to do with determining the question.

The most pregnant fact shown was that no fraud order was issued during the period of defendant's connection with the Company. That the case was not "closed" on March

26th was permitted to be shown by the Government and the inference was permitted to be drawn that this was because of defendant's interference.

The jacket showed that after March 26th complaints continued to come in, more of them than before, and still the routine was continued as before, Taylor receiving the letters in the first instance and sending them to Smith, and he sending them to Dice, who in turn gave them to Price.

Any possible agency of Burton was at an end. He had never done anything openly to stop investigation, and if he had exerted a secret sinister influence, he was doing so no more. The flow of events, however, was languid as ever. It was competent to show this to rebut the inference that because a fraud order was not issued in a case in which the jury were given to understand that it should have issued, an aggravated case, somebody must have done something to prevent it, and that somebody was Burton. But if he was the cause, then his removal would make itself manifest in some way, and if the matter proceeded in the same routine, it was a circumstance to show that no agency of his had effected anything. Looking before and after, everything is the same. There is no significance in the fact that nothing had been done by March 26th. He had not asked that action be withheld, he had not been promised by anybody that it would be. There is no one shown to have been paralyzed by his personal presence or official station. There was nothing in the situation before or after that was different as the result either of addition or elimination.

There did come a marked change in the business of the Rialto Company on June 17th, 1903. Dennis was still sick in California. Mahaney was in charge and he did on that day what the Inspectors in the field, when they discovered it, regarded as a wrong and a fraud. Complaints at once came in from the patrons of the Company. The carbon jacket records one on June 23rd, two on July 2nd, three on

July 11th, one on July 21st. The course of events now was changed.

On July 27th Field Inspectors Price and Piatt began an elaborate investigation, and continued it until August 20th, when they made their report to Dice, the Inspector in Charge. (Rec. pp. 216-225.)

They covered the Company's operations from January 1st, 1903. They say that "as 'bucket shops' that are conducted through the mails exist, it is believed that the Rialto Company has conducted a fairly honest business, with the exception of the deal of June 17th." This deal, they say, was made by Mahaney to cover embezzlements of the Company's funds by himself and McRae. Dennis they seem to regard as "fairly honest," but whether on moral or prudential grounds, they do not commit themselves. They do say that he is undertaking to right the wrongs done by Mahaney. Upon the whole they are *"disposed to accept District Attorney Dyer's advice to recommend no fraud order."* The investigation, they say, was entered into and made most thorough because it was believed, that in spite of seeming adverse rulings in Dennis' and other cases, "an indictment might be drawn against these Companies that might make possible a successful prosecution, and hopes are still entertained that a way may be found to accomplish this most desired end, as per District Attorney Dyer's statement that he will place the whole matter before the Grand Jury after it shall receive the charge from the Court in reference to what he believes to be the law."

Thus the purpose of the investigation was to determine whether section 5480 had been violated, and the end of it was to recommend a prosecution under that section.

Moreover, it dispels mystery respecting the course and progress of the Rialto investigation. The Houts and Evans complaints were promptly investigated and reported upon as unwarranted. Fravel, Allen and Warren made no com-

plaints, they simply sent in the literature of the Rialto Company, which in itself the Inspectors evidently believed called for no action, and warranted none, inasmuch as Judge Adams had held in this very District that the conduct of a bucket shop or of gambling operations was not of itself a violation of the Federal law. And according to the report, as bucket shops go, the Rialto Company "conducted a fairly honest business" until June 17th. When, after June 17th, complaints of actual fraud came in, frauds committed under the management of Mahaney and McRea, a thorough investigation was promptly entered upon. In short, every case of a charge of fraud shown by this record to have been made, was investigated, and promptly. There was no holding back by anybody, and no obstruction interposed anywhere.

And when this full investigation had been completed, District Attorney Dyer, who seems to have been consulted throughout, recommended that no fraud order be issued. It is not contended by the Government that Mr. Dyer was influenced in his recommendation by Senator Burton or anybody else.

September 9th, 1903, Mr. Charles H. Robb, who assisted Mr. Dyer in the prosecution of this case in the Circuit Court, was the Assistant Attorney General for the Post Office Department. The report of the Inspectors Price and Piatt came before him for action. He reported upon it to the Fourth Assistant Postmaster General, saying: "I have considered the report of the Post Office Inspectors and the papers submitted in the case of the Rialto Grain and Securities Company of Saint Louis, Missouri, and in accordance with the recommendation of the Inspectors, *will close the case without further action by the Department at this time.*" He proceeds then to state his views generally, which are that so long as these companies invest the money placed with them in good faith in stocks or grains, they are simply gambling, but if they do not, and divert the money to their

own use, they are guilty of frauds, and he would recommend the issuance of a fraud order. So too, if false and fraudulent representations are made as to the amount of profits realized on investments. (Rec. p. 226).

It is not contended by the Government that Mr. Robb was influenced by Mr. Burton or any one else, and yet, here he is disclosed as the man who prevents the issuance of the fraud order. His action is in confirmation of the recommendation of the Inspectors, which in turn is predicated upon the advice of District Attorney Dyer.

Who stopped the fraud order against the Rialto Company? Three documents in this case make answer; the report of the Inspectors, the recommendation of the Assistant Attorney General for the Post Office Department, and the indictment. In the first the District Attorney speaks through the Inspectors, in the second the Assistant Attorney General speaks for himself, in the third the District Attorney and the Assistant Attorney General speak through the Grand Jury, but none the less, it is they who speak. Let us bring these answers together, for convenience, slightly condensing, but not altering the sense of the indictment:

> *"As 'bucket shops' that are conducted through the mail exist, it is believed that the Rialto Company has conducted a fairly honest business, with the exception of the deal of June 17th, and we are therefore disposed to accept District Attorney Dyer's advice to recommend no fraud order.*
>
> M. G. PRICE,
> W. B. PIATT,
> *P. O. Inspectors."*

> *"I have considered the report of the Post Office Inspectors and the papers submitted in the case of the Rialto Grain and Securities Company of Saint Louis, Missouri, and in accordance with the recommendation of the Inspectors,* WILL CLOSE THE CASE *without further action by the Department at this time.*
>
> C. H. ROBB,
> *Assistant Attorney General for the Post Office Department."*

*The said Joseph Ralph Burton by the influence of his presence and of his office as Senator and by statements, representations and persuasion induced the Postmaster General to believe that the Rialto Company was not conducting a scheme to defraud, and so induced him not to issue a fraud order.*

DAVID P. DYER,
*U. S. District Attorney.*
C. H. ROBB,
*U. S. Assistant Attorney General.*

XI.

**It was Not Competent for the Witness Cochran to Testify that he would have Informed Anyone on November 20th, 1902, whether or not there were Complaints Against the Rialto Company, but Would Not have given the Names of the Complainants, and that he gave them to the Defendant because he was a United States Senator.**

Cochran testified that on November 20th, 1902, the defendant called and asked "whether any complaints had been received or any investigation was under way with reference to the Rialto Grain and Securities Company." He told the defendant that there was such a case, and without being asked therefor gave him the names of the persons on whose complaints the case was jacketed.

He then testified in response to questions by the District Attorney, and over our objection, that he would probably have given to any one inquiring, the fact that a case had been made up, but would not have given the names of the complainants, and he gave these names to the defendant because he was a Senator of the United States. (Rec. 159 and 160.)

This was clearly prejudicial to the defendant. It was

accusation and not evidence. Anyone had a right to inquire at the Department whether charges were pending against some person, and one person has as much right to be fully informed as another. The charge against the Senator was rendering service in the Department for pay. The service and compensation must co-exist to make the offense under the statute. And the service in and of itself may be laudable, and may properly be rendered by a Senator, but if so, must be rendered without pay. As to this matter there could be but two questions, (1) was it, under the circumstances, service in a proceeding pending in the Department, to prevent a fraud order, and (2) was it rendered for compensation? Whether the inquiry was in itself a proper one, was not involved, nor was the propriety of the answer. The reason stated for giving the names of complainants was not disclosed to the defendant, and he was not to be disparaged by something hidden in the inner consciousness of the witness. He had asked simply whether there were any complaints, and not who the complainants were. Inquiring in the same terms that others would inquire, and getting a fuller answer, he is not to be charged, therefore, as having done wrong in making the inquiry, unless it was wrong in itself to make the inquiry.

## XII.

**The Evidence of Francis C. Hubner should not have been Admitted, as it Established Nothing and permitted the Jury to conjecture that there had been an Interview between the Defendant and the Assistant Attorney General for the Post Office Department relative to the Matters charged in the Indictment.**

Hubner testified that on Monday, December 1st, 1902, the defendant called upon Mr. Tyner, then Assistant Attorney General for the Post Office Department, and was with

him for about half an hour. What the interview was about he does not know, as he was not present at it. There was no sign or token of any kind to indicate what, if anything, was being said or done. (Rec. pp. 183 and 184.)

The defendant cannot recollect any such occasion. (Rec. 249.)

The Government promised to connect this with the charge against the defendant, but it was never done. This call stands as an isolated fact, unexplained and therefore of possibly dire import, helping on the mysterious features of the case. The Government alleges many facts against the defendant, but it does not prove them. A call like this on Tyner, if it ever took place, admits of infinite inference. The defendant does not recollect an incident, trifling in itself, and the other party to it is dead. If the defendant did recollect it, and stated it to be of such nature as to exclude all idea of wrong, that would not preclude the Government from vast suggestions, and the jury from vast conjectures as to what transpired. The Cochran interviews signify nothing. They did not stop the fraud order, they could not, for Cochran was not the fraud order man. But Tyner, who had charge of the fraud order cases, who examined the testimony secured by the Inspectors, who considered the cases when they were made up, Tyner could tell us something, could he but revisit these glimpses of the moon. Everything which goes to make the defendant guilty *and which has not been proven*, occurred in that half hour, during that *secret interview*, whose purport we all can guess, but only two do know, and of these one will not speak and the other cannot. And crime is not to go unwhipped of justice, because it is not proven, because the defendant will not confess and the other witness is dead.

But there is absolutely no proof to support any of these vast possibilities, and the probabilities of the case are all to the contrary. The incident is brought out for the first

time on a second trial. It is not connected in the remotest degree with the subject matter of this case. There was at that time nothing in Washington concerning the Rialto Company, except the carbon jacket, which is, so to speak, a blank cartridge. It contains nothing, neither original complaints nor copies of them, but on it are simply endorsed the names of complainants and the dates when their letters were sent out to the Inspectors in Charge. This visit, if there was a visit, was on December 1st. The only complaints then existent were the original ones investigated and reported upon November 14th, and nothing new came in until more than a month after. Tyner in fact did nothing, and could do nothing, as the Inspectors had made no report. He did not direct their actions, and had he attempted it, somebody would have known it. It was not for Tyner to do anything until September 9th, 1903, and then Tyner was no more officer in the Postal Department, for Mr. C. H. Robb was then the incumbent, but there is no evidence to show that the malign influence of that possible interview on December 1st lingered about the office itself, and controlled the action of Tyner's successor, inducing him, nine months afterwards, to recommend that no fraud order issue.

XIII.

**The Charge of the Court as to What Would Constitute Service by the Defendant in the Department is not Responsive to the Charge of the Indictment, and Authorizes a Conviction on Account of Matters not Alleged in the Indictment and is Erroneous in Other Respects.**

The charge of the Court was:

"The questions which relate exclusively to the counts that charge the defendant with having received from the Rialto Grain and Securities Company compensa-

tion for services rendered by him to that Company in relation to the proceedings before named are these:

"Did he render any service for the Rialto Grain and Securities Company before the Post Office Department in the proceeding named? On that question I charge you that if he appeared as agent or attorney of such company before the Post Office Department, or any of its officers, charged with any duty or having any authority over such fraud order proceeding, for the purpose or with the intent of influencing or obtaining action on their part favorable to such company in said proceeding, and did then by any statement or represention respecting the business in which that company was engaged, or the manner in which it was conducting such business, endeavor to obtain any action favorable to such company on the part of the Post Office Department, or any of its officers, in such fraud order proceeding, then he rendered service for said company within the meaning of the statute, and I further charge you that if he appeared as agent or attorney of such company before the Post Office Department or any of its officers charged with any duty or having any authority over such fraud order proceeding for the purpose or with the intent of influencing them in respect of their action in said proceeding, and did then arrange with the Department or any of its officers, that a hearing should be had in respect of such matters, and then also assured the Department, or any of its said officers, that it was the purpose of said company to comply strictly with the law, and then also arranged that no action should be taken against said company in said proceeding without his first being notified thereof, that would constitute service within the meaning of the statute."

The indictment charges the defendant with having rendered services:

"Consisting of his, the said Joseph Ralph Burton's appearing before the said Post Office Department and before the said Postmaster General, the Chief Post Office Inspector and the Assistant Attorney General for said Post Office Department and other officers of said

> Post Office Department as an agent of and attorney for the said corporation *and obtaining information for said corporation*, concerning said proceeding. * * * And by his influence and his presence and persuasion *inducing the said Postmaster General* to believe that said corporation was not conducting any such scheme to defraud as that last above mentioned, and to put a stop to any further investigation of the questions in this count mentioned by said Post Office Department and by said Postmaster General, and to refrain from determining the same adversely to the interests of said corporation, and from instructing said Postmaster at the said post office at St. Louis, aforesaid, to return the registered letters and other letters and matter sent by mail aforesaid, * * * and also from forbidding the payment to the said corporation by the said Postmaster at St. Louis aforesaid of postal money orders drawn to its order or in its favor." (Rec. p. 13.)

It will be observed from a reading of the indictment that the defendant was charged with actually *obtaining information* for the said corporation, and with actually *inducing* the Postmaster General to do certain specific things, and not with doing the things specified in the Court's charge.

The Court eliminates the charge as to obtaining information, in the view, obviously, that this was not rendering service.

The remaining charge of the indictment is that the defendant, by his personal presence, his official influence, his statements, representations and persuasion induced the Postmaster General to believe, etc.

This charges presence with, statements and representations to, influence upon and persuasion of the Postmaster General, individually and personally. He could not be "induced to believe" by proxy.

The Court submits, instead of this charge of the indictment, that he rendered service if he appeared before any officer charged with any duty respecting a fraud order proceeding and endeavored to obtain any action by any officer

favorable to the Company, or if he arranged with any officer of the Department that a hearing should be had.

The indictment charges appearance before a particular officer, the Postmaster General, and inducing him to believe that the Company's cause was just, and to decide favorably to it.

The instruction held that it would be sufficient if he appeared before any officer of the Department having anything to do with a fraud order, and secured or attempted to secure any action in the proceeding favorable to the Company, or even arranged for a hearing.

This presents not the case of a lesser crime within the allegations of a greater. It is the case of a trial upon a state of facts not pleaded in the indictment. Flachskann vs. United States, C. C. A. 7th Ct., 127 Fed. Rep., 674, p. 677.

That an issue not within the scope of the indictment was submitted to the jury is apparent from the opening words of the instruction: "did he render *any* service for the Rialto Grain and Securities Company," because that was not the question to be tried under the indictment.

The question was, did he render the *specific* services mentioned in the indictment.

This is violating the Fifth Article of Amendment to the Constitution in a manner which, because of its indirection, is most dangerous. The charge of the indictment is specific, and the defendant is informed by it of the nature and cause of his accusation, but upon the trial the specific charge is abandoned and a conviction permitted upon something very different, not included in, and not suggested by, the charge of the indictment.

**The Charge of the Court as to what Constitutes Prohibited or Illegal Services Within the Meaning of Section 1782, is also Erroneous in the Following Particulars:**

There was no evidence whatever proper or sufficient to go to the jury that the defendant appeared before the Post

Office Department as the agent or attorney of the Rialto Company for the purpose and with the intent of influencing or obtaining action on their part favorable to said company in any fraud order proceeding, or that he made any statements or representations respecting the business of that company or the manner in which it was conducted to obtain any action favorable to said company on the part of the Post Office Department in said fraud order proceeding, and with a view to preventing the issuance of such an order. The evidence of COCHRAN (pages 159, 161, 166, 168) and of BURTON (pages 235, 236), they being the only witnesses on that point, fully support the proposition that there was no proof to justify the Court in submitting any such question to the jury. Nor was there any proof to justify submitting to the jury that if the defendant as agent or attorney of the Rialto Company appeared before the Post Office Department or its officers and arranged with the department or its officers that a hearing should be had in respect of such matters, and assured the department or any of its officers of the company's purpose to comply with the law, and also arranged that no action should be taken against said company in said proceeding without his being first notified, that such acts would constitute services within the meaning of said section 1782. There was no evidence to justify any such charge. This charge authorized the jury to convict the defendant on what took place between him and Cochran at the first interview on the 20th day of November, 1902, contrary to the united and concurrent testimony both of Cochran and Burton. Not only did the Court err in giving that instruction for want of evidence to justify any such instruction, but the definition therein given of what constitutes services within the meaning of section 1782 is erroneous, and authorized a conviction for acts which the evidence shows to be innocent of any criminal complexion or character. The correct rules on this subject were expressed in instruction 1 (record page 265), instruction 2

(record page 266), and instructions 5 and 13 found on pages 266 and 267 of the record, which the Court erroneously refused to give.

The testimony shows that the defendant did not know of any fraud order inquiry; that the defendant, during the time of his employment by the Rialto Company, did not even know that any inquiry was before the department, or pending therein, as to whether the Postmaster General should issue a fraud order against the said company, and he never rendered any service having any reference whatever to the issuance of a fraud order.

It also shows that no "case" against the Rialto Grain and Securities Company was pending before the Post Office Department. If any complaint was pending there against that company, Burton did not even know of it, much less appear therein for the company.

## XIV.

**The Court at St. Louis had no Jurisdiction to try Counts Three and Seven of the Indictment, nor is such Jurisdiction Conferred by Section 731, Revised Statutes of 1878. The District of Columbia is not a "Judicial Circuit" or "Judicial District" within the meaning of Section 731.**

Counts three and seven of the indictment charge a violation of section 1782 in that services were performed in the Post Office Department (at Washington), to prevent the issuance of "a fraud order." Section 731 of the Revised Statutes is invoked by the prosecution to sustain the jurisdiction of the "Circuit Court of the United States for the Eastern District of Missouri" for the reason, alleged in counts three and seven of the indictment that $500 of the compensation for such service was actually paid to Burton

in St. Louis March 26, 1903, and that such payment was necessary to complete the offense. It was alleged in Counts Three and Seven and assumed by the Court that the services, if any, were rendered in the District of Columbia and in the Post Office Department in said District. It is therefore contended by the Government that under section 731 Burton might be indicted, prosecuted, and punished either in the District of Columbia or in the eastern district of Missouri, and the Government, by reason of such section, had a full right to elect to present this case for indictment in that district and to try him in the city of St. Louis. We deny this right, and further deny that the District of Columbia is within any description of jurisdiction or tribunal included within the terms of section 731.

In the Revised Statutes of 1878 marginal reference is made on page 139 to section 30 of chapter 169, 14 Statutes at Large, page 484. This is the original statute from which revision was made and from which section 731 was drawn and collated. By reference to that act it will be seen it was an act to amend the existing laws relating to internal revenue and for other purposes. This particular provision of the act undoubtedly had reference, as its context shows, to conspiracies to defraud the United States in matters of revenue. The language of section 30 of chapter 169 of the Session Laws of 1867 is as follows:

> "And when any offense shall be begun in one judicial district of the United States and completed in another, such offense shall be deemed to have been committed in either of the said districts, and may be dealt with, inquired of, tried, determined and punished in either of the said districts in the same manner as if it had been actually and wholly committed therein."

By comparing this language with section 731 of the revision it will be observed that in such revision the language has been carefully and deliberately changed. The enrolled act (sec. 731) reads "judicial circuit;" and this is conclu-

sive. (*Field vs. Clark,* 143 U. S. 649.) The omission of the words "of the said district" seems to have been deliberate and purposed. By section 731 as it stands, the prerequisite to the trial in more than one jurisdiction of an accused person for any offense begun in one place and ended in another is, that such offense shall have been begun in one "judicial circuit" and completed in another "judicial circuit," and in such event only would the offense be deemed to have been committed in part in one jurisdiction and completed in another jurisdiction. The language which follows, to the effect that it may be "punished in either district," clearly does not obviate the essential requirement of the preceding clause of the statute.

A "judicial circuit" of the United States, in the language of the law and of the statutes of the United States, is as definite, well understood, and limited a term as is the term "judicial district." It must also be remembered that section 731 of the Revised Statutes is a part of the general title "The Judiciary," and is to be read in connection with the general definition and use of words under that title. The title deals with questions of jurisdiction and procedure of the Federal courts. Chapter 1 of this title number 13 relating to the judiciary deals with the subject of "judicial districts." Section 530 is as follows:

"The United States shall be divided into judicial districts as follows," and here follows a list of judicial districts established by the act. They are confined to districts in the States of the Union, and do not include in the enumeration the courts of any Territory or of the District of Columbia. This is made plain by section 569:

> "When any Territory is admitted as a State and a district court is established therein the said district court shall take cognizance of all cases which were pending and undetermined in the superior court of such Territory, etc., etc."

A "judicial circuit" of the United States, in the language

of the law and of the statutes of the United States, is as definite, well understood, and limited a term as a judicial district. There are nine judicial circuits. Under the same title number 13, "the judiciary," by section 604, judicial circuits are provided for and defined under the following heading of the chapter "JUDICIAL CIRCUITS." The language of the first paragraph of the act is as follows:

"The judicial districts of the United States are divided into nine circuits as follows:"

The first circuit including the districts of Rhode Island, Massachusetts, New Hampshire and Maine. And so the **act continues up to the provision for the ninth circuit.**

It therefore appears that by the terms of this act judicial districts and judicial circuits are clearly described and defined and distinguished. In no instance, so far as we have been able to discover in the statute, are the words "judicial district" and "judicial circuit" used convertibly and as synonymous. That the nature of the title and chapters relating to judicial districts and circuits may be made clear, we reproduce the chapter heads and text as they appear in the revision.

## Revised Statutes, 1878.

TITLE XIII.

### THE JUDICIARY.

CHAPTER ONE.

### Judicial Districts.

"The United States shall be divided into judicial districts as follows: The States of California, Connecticut," etc. [all *States* and the District of Columbia is not among them.]

CHAPTER FIVE.

**Judicial Circuits.**

"The judicial districts of the United States are divided into nine circuits, as follows:"

[Here follow circuits, including districts, and the District of Columbia is not among them.]

**Provisions Common to More than One Court or Judge.**

[This means common to more than one of the Courts or judges dealt with in the Title XIII, which do not include courts or judges in the District of Columbia.]

> "SECTION 731. When any offense against the United States is begun in one judicial circuit and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined and punished in either district, in the same manner as if it had been actually and wholly committed therein."

We make, therefore, two points, both equally fatal to the jurisdiction of the court in St. Louis:

First. That the words "judicial circuit" are used by Congress advisedly and cannot, in a matter relating to life and liberty, be altered by the court for any purpose; and the District of Columbia is no part of any judicial circuit, the judicial circuits being confined to the union of districts into circuits theretofore defined, all such districts being wholly within the limits of organized States of the Union.

Second. That if it were in the power of the court to change the language of the act and to declare the legislative intention to be that the word "circuit" should read "district," it would not aid the jurisdiction, because the districts referred to in section 731 are the districts within the terms of title number 13, "THE JUDICIARY," and that section exclusively applies to districts within organized States,

and has, and can have, no reference to the jurisdiction of courts within the boundaries of the territory or of the District of Columbia.

The question thus distinctly arises on the face of Counts Three and Seven of the indictment. Two elements or ingredients are essential to constitute the offense charged against the defendant: *First*, the rendering of prohibited services in the Department; *second*, the receipt of compensation for such services. Both are essential to the completion of the offense.

Counts Three and Seven of the indictment allege that the services rendered by the defendant were so rendered in the Post Office Department of the United States, also that the $500 compensation for such services was received by the defendant at the city of St. Louis, in the eastern district of Missouri.

Section 731, R. S., was intended to meet the case where some of the acts material and essential to the crime charged in the indictment and requisite to its completion occur in one Federal jurisdiction and some of such acts in another Federal jurisdicition, and it provides that in such case the accused may be indicted, tried, and punished in either jurisdiction. It provides for no other case than the one where some of the acts essential and material to the crime and requisite to its consummation occur in one Federal jurisdiction and some in another Federal jurisdiction. The indictment shows on its face that the services alleged to have been rendered by the defendant which are essential to the consummation of the offense were rendered in the city of Washington, in the District of Columbia, and that the compensation alleged therefor, which is also essential to the completion of the offense, was received by the defendant in the city of St. Louis.

The Sixth Amendment of the Constitution of the United States provides as follows:

> "In all criminal prosecutions the accused shall be entitled to a speedy and public trial by an impartial jury

of the *State and district* wherein the crime shall have been committed, which district shall have been previously ascertained by law."

This makes more definite the provision in article 3, section 2, of the Constitution, which ordains that the trial "*shall* be held in the *State* where the crime was committed." The Constitution in this Sixth Amendment states that the trial must be in the State and district where the crime has been committed—that is to say, in all cases the trial must be within the limits of a State, and if a State has more than one judicial district the trial must be in that district of the State in which the crime was committed.

At common law and under the Constitution of the United States, and in the absence of statute where a crime consists of two acts, one done in one jurisdiction and another in another jurisdiction, no prosecution can be had in either.

Therefore, in the absence of statute so providing, Senator Burton could not be tried in St. Louis for the offense alleged in Counts Three and Seven of the indictment. There is no statute which provides for the case.

The words "judicial district" as used all through Title XIII, "The Judiciary," never include the District of Columbia or the Territories. On the contrary, whenever this Title XIII has any provision in respect of the District of Columbia it mentions the District of Columbia by name, as, for example, in section 705, when it provides that "final judgment or decree by the supreme court of the District of Columbia," etc., may be reviewed by the Supreme Court of the United States, and also in section 811, where there is a provision as to grand juries in the "District of Columbia," the language being "the *circuit* and *district* courts, and the district courts of the *Territories*, and the supreme court of *the District of Columbia* may discharge their grand jurors," etc. So also the provision in section 871 and section 874 providing for depositions in the "District of Columbia" in suits pending elsewhere.

So also this Title XIII, when it refers to a Territory or to

the courts of a Territory, mentions the Territory or the courts of the Territory by that name.

The Revised Statutes do not deal generally with the Territories, or with the courts of Territories, or with the District of Columbia, or the Courts of the District of Columbia under this Title XIII, "The Judiciary."

*Section* 731, R. S., which is itself in Title XIII, reads "judicial circuit," which means only "judicial circuits" defined in Title XIII, composed of the "judicial districts" defined in Title XIII, in the organized States.

The revisers in 1878 must be presumed (nothing appearing to the contrary) to use the words "judicial circuit" or "district" as they had defined them in Title XIII, and they there limited them to judicial circuits and districts in the several States of the Union, and the words do not include any judicial district, much less any judicial circuit in the Territories or in the District of Columbia.

*If this section 731 were to be construed as meaning anything else, it would be contrary to article 3, section 2, of the Constitution of the United States and contrary to the Sixth Amendment.*

Suppose a man commmited a crime consisting of two parts, one in the State of Colorado and the other in the Territory of New Mexico, both parts being essential to the existence of the offense. The offender could not be punished in any court of the Territory of New Mexico for that part of the offense which was committed in the State of Colorado for the reason that article 3, section 2, and the Sixth Amendment of the Constitution of the United States provide that the trial of the crime *shall* take place in the *State and district* in which the offense was committed, and, in the case stated of an attempt to try such a crime in New Mexico for an offense committed in Colorado, the crime would not be tried in the *State* and district in which it was committed.

The same principle applies to a crime consisting of two parts, one part committed in a State and one part in the District of Columbia.

As to an offense committed, one part in a State and one part in a Territory, it cannot be held that section 731 would authorize the trial of such crime in a State on the theory that that part of the statute which undertakes to authorize the trial in a Territory (if such construction were to be placed upon it) could be stricken out as separable, and thus leave the statute to stand as a valid statute authorizing the trial in a State, for the words which it would be necessary to strike out are not separable from the rest of the statute. On the contrary, if the words which (on such a construction) undertake to make the offense triable in a Territory be stricken out, the operative part of the statute is stricken out and nothing remains under which the offense could be tried in the State. These words are, "it shall be deemed to have been committed in either and may be dealt with, inquired into and determined and punished in either."

The statute does not read that the offense shall be deemed to have been committed in the State, and that it may be punished in the State, but that it shall be deemed to have been committed in "*either* (State or Territory).

We therefore maintain that whether section 731 be construed as it now reads, "judicial circuits," or whether it shall read "judicial districts," it could not give and did not give to the Circuit Court of the United States for the Eastern District of Missouri any jurisdiction to try the offense alleged in Counts Three and Seven of the indictment; for in either event the alleged offense was not begun in one "judicial circuit" or in one "judicial district" within the meaning of section 731, and completed in the Eastern District of Missouri, and therefore section 731 in any view has no application to the case.

This question arises on the face of the indictment which

is a part of the common law record and is reviewable on a writ of error. The question also arises on the motion made by defendant at the end of the Government's testimony for a direction of a verdict of not guilty, and also on a similar motion made by defendant at the close of all the testimony, and also on the final judgment.

## IN CONCLUSION.

It is not difficult, viewing the conduct of men with suspicion, to discover in everything they do a bad motive and a bad purpose. In our judgment of men the conclusion we reach depends upon the presumption we indulge. The same acts are taken by one to prove guilt and by another to prove innocence, and they may be consistent with either. But our law declares as a rule, not of mercy, but of absolute justice, that a man charged with wrong must be presumed to be innocent, and that his acts consistent with innocence shall not be taken as evidence of guilt, simply because also consistent therewith. We ask for the defendant in the consideration of this case, this measure of justice, and no more.

He was a Senator of the United States, and he was a poor man. He desired to supplement his official salary by the earnings of his professional labor. This he might lawfully and rightfully do.

An opportunity presented itself in the case of the Rialto Company. He was called upon to assist in the defense of its President, who was involved in trouble, as he insisted, through the machinations of others. It was desired also that he should assist in starting the Company in a new line of business, which was entirely legitimate and proper.

There is no function of the lawyer more honorable than the defense of persons charged with crime. It is imposed upon him as a sacred duty by his oath, it is secured as a right of every citizen, the highest as well as the humblest, by the Constitution of the Nation and of every State. To guide, counsel and direct a client in his business affairs within the law of the land is the absolute right of the lawyer, if not so high a duty as the defense of persons charged with crime.

The employment of the defendant by the Rialto Company

was ostensibly at least, for these purposes. And nothing existed at that time to suggest any sinister reasons for his employment. Dennis was a man in good standing, prominently engaged in a reputable business, aside from his connection with the Rialto Company. He was, if not wealthy, at least well to do, and not likely, therefore, to hazard the loss of his fortune in an illegal venture which could have but a short course to run, and must end in disaster. The Rialto Company itself had been newly organized, and was being advised in the general conduct of its business by reputable members of the St. Louis bar. That its business was of a speculative character is true, but so is an enormous volume of the business of the country. We may approve or disapprove of the Stock Exchanges and the Boards of Trade, but they are with us as business institutions, adjudged to be legal, and they invite and incite to participation in their operations. At this time the Rialto Company could and did refer as to its credit and standing to commercial agencies, to banks, and to Trust Companies.

When the defendant agreed to serve this Company, he knew and could know only what thus appeared upon the surface, and this was presented to him in its best aspect.

The apprehended indictment of Dennis, explained to be due to the conduct by others of the Brooks Brokerage Company's business, could not speak the condemnation of the Rialto Company. It would suggest very naturally to the defendant, when he went to inquire whether the Department intended to press the case against Dennis, to inquire also whether there were any complaints against the Rialto Company, and it was just as natural that he should explain the fact that he inquired. He was the counsel of the company and was advised that it was doing a legitimate business, but if it was to become involved with the Post Office Department, he, being a Senator, would have nothing to do with it—not simply in the Department, but neither in the

Department nor out of it. This is the only intelligible explanation of what he said as to his position.

That he would like to be informed, in so far as it was proper to inform him, if troubles arose, was a necessary and proper incident of his position. If there was to be trouble, he wished to know it, and sever his relations with the Company. He was assured that the usage was to give notice and to allow a hearing in such cases, and with this he was content. He asked for nothing more.

Advised from St. Louis that the complaints of which he had learned from Cochran had been investigated and found unwarranted, he never again inquired of Cochran, even as to the existence of complaints, and never was informed of any. He did inquire of Cochran whether two men who, he had been told, were falsely representing themselves to be Inspectors, were such and ascertained that they were not. As emphasizing his answer, Cochran may well have said that these men had not been sent out, and that nobody had been sent out to investigate the Company, because there was nothing in the Department against it. This was true. No complaints had been made since those which had been sent out early in November.

The defendant never made inquiry concerning the Rialto Company, aside from Cochran, unless he made it on December 1st of General Tyner. Of this there is no evidence. There was nothing before Tyner. He has never spoken a word. The defendant denies any such interview with him, and we must either accept that denial or else do what has no warrant in reason, law or justice, reject that denial, and conjecture that the defendant arranged with Tyner to prevent the issuance of a fraud order.

Everything done by the defendant in the Department was done as an incident of the Dennis case. But relations are reversed, and it is assumed against the defendant that the Dennis case was but an incident of what was done in the

Department. The indictment against Dennis is said to have been a trivial matter, and to have served as a mere pretext for the employment of the defendant for his influence in the Department. And yet that indictment crushed Dennis and killed him. The significance of that indictment in this case is determinable not by what others may now assume to think of it, but by what Dennis then did think of it.

The agreement between the defendant and the Rialto Company, according to its terms as stated by Harlan and the defendant, who alone knew what its terms were, was a fair and lawful one, and it must be presumed to have been intended as such, unless there is something in the evidence to impeach the good faith of the parties. This is sought to be accomplished by evidence of what Burton did under the agreement. His services in connection with the indictment and the securities business, the latter not carried far because of Dennis' collapse in body and mind, are all ignored, and what was said casually upon one or two occasions in the Department is insisted upon as the whole of the defendant's service under the agreement.

The Rialto Company, it is said, was a bad concern, complaints of fraud were made against it to the Department, a fraud order should have been issued against it, and would have been but the defendant prevented it. This is the charge of the indictment against the defendant plainly stated, this is the accusation affirmed by the verdict, this is the offense for which sentence was imposed, and, if the conviction in this case stands, this is the crime, the shame and reproach of which the defendant must bear to the grave.

What is the truth as to all this? The Rialto Company was an institution of fair seeming, and, with one exception, occurring long after the defendant was out of all relations with it, was pronounced by the Government, when it had learned the whole truth respecting it, to be "fairly honest." But whether it was so or not was by the Court held to be

immaterial, and so can prove nothing. Complaints were made, and all the defendant did was to ascertain that fact, and before he had done this, the complaints had been investigated and disregarded. Other complaints were made, but the defendant was not advised of them. He never pretended to have knowledge of the merits of any complaint, he never discussed one with any official. During the entire time that is to be considered, nobody in the Department proposed a fraud order, and the defendant neither did nor had occasion to speak against the issuance of one. More than this, nobody in the Department, save the Chief Clerk of the Bureau of Inspection and the Inspectors at St. Louis, knew anything whatever of any complaints against the Rialto Company. In a mechanical way, following the usage of years, the letters that came in were referred from one functionary to another until they came to the man in the field, and he, the only person called upon to consider or to act, saw nothing in them until after June 17th, 1903, when Burton had passed from the stage, that required action of any kind. He called in an associate, and whatever we may say in a technical sense, now for the first time was anything done or proposed to be done, and now was the time for the defendant to interfere, if his interference was ever desired, or was to accomplish anything. The investigation was begun July 27th, and ended August 20th, 1903. It was apparently thorough and was conducted under the legal guidance of the District Attorney, D. P. Dyer. When it was closed, and the whole truth made known, when the "fairly honest" management of Dennis, and the fairly dishonest management of Mahaney and McRae were revealed, the Inspectors, upon the advice of the District Attorney, recommended that no fraud order be issued, and when the report of these same Inspectors, showing all the facts, together with the recommendation, came before the Hon. C. H. Robb, then Assistant Attorney General for the Post Office Department, he accepted that recommendation, and closed the case.

Unless there has been an offense, there can be no offender. In every criminal case, the first inquiry should be, not is the defendant guilty, but has a crime been committed? In the present case, if we first inquire whether a crime has been committed, we will get no farther. Everything done respecting the complaints against the Rialto Company was done under the rules and regulations of the Post Office Department by the proper officials and in the manner prescribed, without let or hindrance from any one. All letters came in the first instance to Taylor, and he passed them on to Smith. Nobody sought to prevent him. Smith passed them on to Dice. Nobody sought to prevent him. Dice passed them on to Price. Nobody sought to prevent him. Price investigated the first complaints, and reported them unfounded. Nobody influenced or sought to influence him to this. Later complaints were investigated by him and reported upon as affording a possible basis for prosecution, but none for a fraud order. In this he was influenced only by the District Attorney, whose advice and guidance he very properly followed. This report upon the later complaints came before the Assistant Attorney General for the Post Office Department, and he approved it. Nobody persuaded him to this or sought to do so. Thus, as we follow the so-called proceeding against the Rialto Company, step by step, from its beginning to its close, we find everything done according to rule, and no interference from the outside and none attempted. There was absolutely no offense. And yet the defendant stands convicted as an offender. We appeal against the injustice of a sentence which imposes upon the defendant the shame and punishment of a crime which has not been committed.

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W. H. ROSSINGTON,
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F. W. LEHMANN,
*For Plaintiff in Error.*

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## APPENDIX.

## CONSTITUTION OF THE UNITED STATES.

"ARTICLE III, SECTION 2. The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as Congress may by law have directed."

### Fifth Amendment to the Constitution.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

### Sixth Amendment.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

### Privileges of Congress and Members.

The Constitution of the United States provides, as respects the privilege of Congress, *inter alia*, as follows:

"They (the Senators and Representatives) shall in

*all cases* except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same."

Const., Art. I, Sec. 6.

## STATUTORY PROVISIONS.

### Revised Statutes United States.

"SECTION 731. When any offense against the United States is begun in one judicial circuit and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined and punished in either district, in the same manner as if it had been actually and wholly committed therein."

Section 1782 is the one on which the indictment is founded, and is as follows:

"SECTION 1782. No Senator, Representative, or Delegate, after his election and during his continuance in office, and no head of a Department, or other officer or clerk in the employ of the Government, shall receive or agree to receive any compensation whatever, directly or indirectly, for any services rendered, or to be rendered, to any person, either by himself, or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party, or directly or indirectly interested, before any Department, court-martia[1], Bureau, officer, or any civil, military, or naval commission whatever. Every person offending against this section shall be deemed guilty of a misdemeanor, and shall be imprisoned not more than two years, and fined not more than ten thousand dollars, and shall, moreover, by conviction therefor, be rendered forever thereafter incapable of holding any office of honor, trust or profit under the government of the United States."

Section 5480 of the R. S., is as follows:

"SEC. 5480. If any person having devised or intending to devise any scheme or artifice to defraud, or to

sell, dispose of, loan, exchange, alter, give away, or distribute, supply, or furnish, or procure for unlawful use any counterfeit or spurious coin, bank notes, paper money, or any obligation, or security of the United States or of any State, Territory, municipality, company, corporation, or person, or anything represented to be or intimated or held out to be such counterfeit or spurious articles, or any scheme or artifice to obtain money by or through correspondence, by what is commonly called the 'sawdust swindle,' or 'counterfeit money fraud,' or by dealing or pretending to deal in what is commonly called 'green articles,' 'green coin,' 'bills,' 'paper goods,' 'spurious Treasury notes,' 'United States goods,' 'green cigars,' or any other names or terms intended to be understood as relating to such counterfeit or spurious articles, to be effected by either opening or intending to open correspondence or communication with any person, whether resident within or outside the United States, by means of the Post Office Establishment of the United States, or by inciting such other person or any person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice or attempting so to do, place or cause to be placed, any letter, packet, writing, circular, pamphlet, or advertisement in any post office, branch post office, or street or hotel letter box of the United States, to be sent or delivered by the said post office establishment, or shall take or receive any such therefrom, such person so misusing the post office establishment shall, upon conviction, be punishable by a fine of not more than five hundred dollars and by imprisonment for not more than egihteen months, or by both such punishments, at the discretion of the court."

Sections 3929 and 4041 of the R. S., which confer authority upon the Postmaster General respecting fraud orders, are as follows:

"SEC. 3929. The Postmaster General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance or drawing of

any kind, or that any person or company is conducting any other scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations or promises, instruct postmasters at any post office at which registered letters arrive directed to any such person or company, or to the agent or representative of any such person or company, whether such agent or representative is acting as an individual or as a firm, bank, corporation or association of any kind, to return all such registered letters to the postmaster at the office at which they were originally mailed, with the word 'Fraudulent' plainly written or stamped upon the outside thereof; and all such letters so returned to such postmasters shall be by them returned to the writers thereof, under such regulations as the Post Master General may prescribe. But nothing contained in this section shall be so construed as to authorize any postmaster or other person to open any letter not addressed to himself. The public advertisement by such person or company so conducting such lottery, gift enterprise, scheme or device, that remittances for the same may be made by registered letters to any other person, firm, bank, corporation or association named therein shall be held to be *prima facie* evidence of the existence of said agency by all the parties named therein; but the Postmaster General shall not be precluded from ascertaining the existence of such agency in any other legal way satisfactory to himself.

"SEC. 4041. The Postmaster General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise or scheme for the distribution of money, or of any real or personal property by lot, chance or drawing of any kind, or that any person or company is conducting any other scheme for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations or promises, forbid the payment by any postmaster to said person or company of any postal money orders drawn to his or its order, or in his or its favor, or to the agent of any such person or company, whether such agent is acting as an

individual or as a firm, bank, corporation or association of any kind, and may provide by regulation for the return to the remitters of the sums named in such money orders.

"But this shall not authorize any person to open any letter not addressed to himself.

"The public advertisement by such person or company so conducting any such lottery, gift enterprise, scheme or device, that remittances for the same may be made by means of postal money-orders to any other person, firm, bank, corporation or association named therein shall be held to be *prima facie* evidence of the existence of said agency by all the parties named therein; but the Postmaster General shall not be precluded from ascertaining the existence of such agency in any other legal way."

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

## No. 539.

JOSEPH RALPH BURTON, PLAINTIFF IN ERROR,

*vs.*

THE UNITED STATES, DEFENDANT IN ERROR.

## SEPARATE BRIEF OF PLAINTIFF IN ERROR ON THE CONSTITUTIONALITY OF ACT OF 1864.

### The Act of 1864, Rev. St., Sec. 1782, under Which the Indictment was Found, is Unconstitutional.

For the convenience of the Court in its consideration, and because of the gravity and importance of argument to follow, we have embodied it in a separate brief.

### ARGUMENT AND BRIEF.

The act of 1864, now Rev. St. Sec. 1782, is in conflict with the fundamental idea on which our whole federal government is founded, viz: that the federal government is a government of limited powers, with duties defined and restrictions imposed, and no authority is lodged anywhere to

change those duties or restrictions, except the power reserved by the people.

The framers of our government, in order to prevent the concentration of power into the hands of one man or one body of men, created three departments,—not necessarily to work in harmony together, but each to act wholly independent of the other. It was the intention, as shown by the debates in the constitutional convention and the Constitution itself, to establish an impassable gulf separating these three great departments of the federal government. One department shall not encroach upon or in any way coerce the other. To that end there should be no blending of governmental functions, except where it was absolutely necessary, and then the Constitution clearly and zealously guarded the independence of each department, thus emphasizing the basic principle that the great powers of government were so eternally separated each from the other that there could be no conflict between them. The legislature should make, the judiciary interpret, and the executive should administer, the laws.

And just here it is necessary to observe the line of demarcation between the official and the citizen, and the no less clearly defined distinction between the constitutional official and the official that is created by legislative enactment.

The President, the members of Congress, and the Judges of the Supreme Court are the only officers of the federal constitution. All other officers of those several departments are creatures of the legislature, or what this Court has styled congressional officers, as distinguished from constitutional officers. The office of the legislative official may be enlarged, modified or abolished by Congress. This is not true of a constitutional office. It is permanent, fixed, and above and beyond the control of Congress. It is also above and beyond the power of the executive or the judicial departments. It gets its life from and can only be changed by the Constitution.

Every citizen, be he official or in private station, is alike

amenable to the law, but the constitutional official, acting as an official, cannot be called to an account, or punished for any official act, except in the mode as defined and prescribed in the Constitution creating him. The recognition of this principle is absolutely necessary to protect him in his independence as an official, and to protect the great constitutional bodies in their independence.

The Constitution defines just how the President, a member of this Court, and a member of Congress can be punished for any official misconduct, and by such constitutional provisions limits the manner of punishment; and Congress has no power to add to or take from the express provisions so made for that purpose. The denial of this proposition would place it in the power of Congress to destroy the independence of each department, and nullify the Constitution, and that is just the effect of the law under which this prosecution is brought.

The President may be impeached for "treason, bribery, or other high crimes and misdemeanors," and he cannot be punished in any other way than as prescribed by the Constitution. A member of this Court can be proceeded against in the same manner and in no other way. A member of Congress may be punished in such manner as each House may determine as to its "own members," and the right to expel extends to all cases where the offense is such as, in the judgment of "each House," is inconsistent with the trust and duty of "its *own* members."

It would certainly be an anomaly in a constitutional government, with three co-ordinate branches of such government, as created by the federal constitution, if the legislative branch, under whatever pretext, could enact a law making any act of the President, or any act of a Justice of the Supreme Court, a misdemeanor, and delegate the jurisdiction and power to an inferior judicial tribunal to try the President, or a Justice of this Court, for a violation of such law, and subject him to fine, imprisonment and removal from

office as the result of a verdict of a jury. The mere statement of the proposition would seem to be sufficient to condemn it as absurd, and the shield of the Constitution is no greater protection for the President,—for the Justice of the Supreme Court,—than for the Senator,—each and all of whom are created by the Constitution.

"The Government of the United States is one of *enumerated* powers,—The National Constitution being the instrument which specifies them,—and in which authority should be found for the exercise of any power which the National Government assumes to possess. In this respect it differs from the Constitutions of the several States which are not grants of powers to the States, but which apportion and impose restrictions upon the powers which the States inherently possess" (Cooley Const. Lim., 7th ed., p. 11).

In the case of Martin *vs.* Hunter, Lessees, 1 Wheat., 304, 343, Chief Justice Marshall, speaking for the Court, among other things, said:

"The Government of the United States can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication."

In the case of Ableman *vs.* Booth, 21 How. (U. S.), 519, it was said, by Chief Justice Taney, that:

"The same purposes are clearly indicated by the different language employed when conferring supremacy upon the laws of the United States, and jurisdiction upon its courts. In the first case it provides that: 'this Constitution, and the laws of the United States *which shall be made in pursuance thereof*, shall be the supreme law of the land, and obligatory upon the judges in every state.' The words in italics show the precision and foresight which marks every clause in the instrument. The sovereignty to be created was to be limited in its powers of legislation, and if it passed a law not authorized by its enumerated powers, it was not to be regarded as the supreme law of the land; nor were the judges bound to carry it into effect."

In the case of *Ex Parte* Virginia, 100 U. S., 361, in discussing the Constitution and amendments, the Court said:

"The provision authorizing Congress to enforce them, by appropriate legislation, does not enlarge their scope, nor confer any authority which would not have existed independently of it. No legislation would be appropriate which should contravene the express prohibitions upon Congress previously existing, as, for instance, that it should not pass a Bill of Attainder, or an *ex post facto law. Nor would legislation be appropriate which should conflict with the implied prohibitions upon Congress.* They are as obligatory as the express prohibitions."

It was said by Mr. Justice Miller, speaking for the Court in the case of Kilbourn *vs.* Thompson, 103 U. S., 182, that:

"The powers of Congress itself, *when acting through the concurrence of both branches, are dependent solely on the Constitution.* Such as are not conferred by that instrument, either expressly or by fair implication *from what is granted,* are 'reserved to the states respectively, or to the people.' "

It is provided in Section 3, Article 1, Constitution of the United States, that:

"The senate of the United States shall be composed of two senators from each state, chosen by the legislature, for six years."

A senator is therefore a constitutional officer. And it is further provided that:

"No person shall be a senator who shall not have attained the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state from which he shall be chosen."

A person possessing these qualifications is eligible to the office of United States Senator, unless he comes within the disqualifications provided by section three of the Fourteenth

Amendment to the Constitution of the United States,—which reads as follows:

"No person shall be a senator or representative in congress, or elector of President or Vice-President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability."

The Constitution, by Section 6, Article 1, provides what he shall not do during the time for which he was elected, viz:

"No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States which shall have been created, or the emoluments whereof shall have been increased, during such time."

Has Congress the constitutional power to superadd qualifications and disqualifications to those prescribed by the Constitution of the United States, which created the office of United States Senators?

By Section 1, Article 2, Constitution of the United States, it is provided that: "No Senator * * * shall be appointed an elector." And it is provided by Section 4, Article 1, that:

"The times, places and manner of holding elections for senators and representatives shall be prescribed in each state by the legislatures thereof; but Congress may at any time, by law, make or alter such regulations, *except as to the places of choosing senators.*"

By the tenth amendment to the Constitution it is provided that:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

The Constitution, in no uncertain language, has fixed the qualifications of the Senators, and the disqualifications, "during the time for which he was elected." But for the Act of 1864, a citizen holding the office of United States Senator, under the Federal Constitution, had the right "to receive, and agree to receive," compensation for "services rendered or to be rendered to any person," in any matter pending before "any department, court-martial, bureau, office, or any civil, military or naval commission whatever," of the Federal Government, the same as any other citizen. It does not follow, however, that he could not be punished for such acts, even if there had been no statute on the subject. The power to punish a Senator has been expressly conferred by the Constitution, and the mode and procedure fixed and designated by Section 5, Article 1, of the Constitution, which reads:

"*Each* house shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties as *each* house may provide.

*Each* house may determine the rules of its proceedings, punish its members for disorderly behavior, and, *with the concurrence of two-thirds, expel a member.*"

In the case of Kilbourn *vs.* Thompson, 103 U. S., 182, it was said that:

"Of course neither branch of Congress, when acting separately, can lawfully exercise more power than is con-

ferred by the Constitution on the whole body, except in the few instances where authority is conferred on either House separately, as in the case of impeachment. No general power of inflicting punishment by the Congress of the United States is found in that instrument. * * * *That instrument, however, is not wholly silent as to the authority of the separate branches of Congress to inflict punishment.* It authorizes each House to punish its own members. By the second clause of the fifth section of the first article, 'each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member'; and, by the clause immediately preceding it, 'may be authorized to compel the attendance of absent members, and in such manner and under such penalties as *each* House may provide.' These provisions are equally instructive in what they authorize, and in what they do not authorize."

And again, on page 189, it is said that:

"As we have already said, the Constitution expressly empowers each house to punish its own members for disorderly behavior. We see no reason to doubt that *this punishment may, in a proper case, be imprisonment,* and it may be for refusal to obey some rule on that subject made by the House for the preservation of order."

Under the authority thus expressly conferred, the Senate had the undoubted power to adopt a rule that "No Senator, after his election, and during his continuance in office, shall receive, or agree to receive, any compensation whatever, directly or indirectly, for any service rendered or to be rendered to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest or other matter or thing in which the United States is a party, or directly or indirectly interested, before any Department, court-martial, bureau, officer, or any civil, military or naval commission whatever;" and, to make such a rule effective, would not require the concurrence of the House of Representatives.

This proposition is not only settled by the decision of this Court, cited *supra,* but it has a strong precedent in its support. In 1 Vol. Story on Const., 589 (4th ed.), it is stated:

"In July, 1797, William Blount was expelled from the Senate for 'a high crime and misdemeanor, entirely inconsistent with his public trust and duty as a Senator.' The offense charged against him was an attempt to seduce an American agent among the Indians from his duty, and to alienate the affections and confidence of the Indians from the public authorities of the United States, and a negotiation for services in behalf of the British Government among the Indians. *It was not a statutable offense; nor was it committed during the session of Congress; nor at the seat of Government.* Yet, by an almost unanimous vote, he was expelled from that body; and he was afterwards impeached (as has already been stated) for this, among other charges. It seems, therefore, to be settled by the Senate, upon full deliberation, that expulsion may be for any misdemeanor which, *though not punishable by any statute,* is inconsistent with the trust and duty of a Senator."

"In the case of John Smith (a Senator), in April, 1808, the charge against him was for participation in the supposed treasonable conspiracy of Colonel Burr. But the motion to expel him was lost by a want of the constitutional majority of two-thirds of the members of the Senate. The precise grounds of the failure of the motion does not appear; but it may be gathered from the arguments of his counsel that it did not turn upon any doubt that the power of the Senate extended to cases of misdemeanor not done in the presence or view of the body; but most probably it was decided upon some doubt as to the facts. It may be thought difficult to draw a clear line of distinction between the right to inflict the punishment of expulsion and any other punishment upon a member, founded on the time, place or nature of the offense. The power to expel a member is not, in the British House of Commons, confined to offenses committed by the party as a member, or during the session of Parliament; but it extends to all cases where the offense is such as, in the judgment of the House, unfits him for parliamentary duties."

It will therefore be seen that, by the Constitution, there has been delegated express power to each House to punish its own members, in such manner as, in its wisdom, is just and proper, and, by "the concurrence of two-thirds, may expel a member."

Mr. Cooley, in his work on Constitutional Limitations (7th ed.), page 99, says:

"When the Constitution defines the circumstances under which a right may be exercised or a penalty imposed, the specification is an implied prohibition against legislative interference to add to the condition, or to extend the penalty to other cases. On this ground it has been held by the Supreme Court of Maryland that where the Constitution defines the qualification of an officer, it is not in the power of the legislature to change or superadd to them, unless the power to do so is expressly, or by necessary implication, conferred by the Constitution itself."

And this proposition laid down by Mr. Cooley seems to be well supported by unquestioned authority.

In the case of Lowe *vs.* Commonwealth, 3 Met. (Ky.), 241, almost the identical question is decided. The court said:

"But the question yet remains to be decided whether the legislature can prescribe any other mode of removing such officer from office than those furnished by the Constitution or enact a law whereby such officers may be suspended from a performance of their respective duties, and deprived of the emoluments of the same,—which suspension, so far as the officer is concerned, would certainly be tantamount to a removal.

It seems to us that there can be but one view of this question, which is that wherever the Constitution has created an office and fixed its term, and has also declared upon what grounds and in what mode an incumbent of such office may be removed before the expiration of his term, it is beyond the power of the legislature to remove such officer, or suspend him from office for any reason, or in any other mode than the Constitution itself has furnished.

To recognize the existence of such a power would be, in

effect, to say that these provisions of the organic law of the land are subject to legislative caprice, and, to that extent, to defeat and violate the restrictions and safeguards which were inserted in the Constitution, in order to give it permanence and stability. The result of such a doctrine might be pernicious in the extreme.

The Governor's term of office is fixed by the Constitution. That instrument likewise provides how he may be impeached and removed, and declares that all impeachments shall be tried by the Senate. Would it be seriously contended that the legislature could, by enactment, subject him to trial for official misconduct, in any other mode,—as by indictment or presentment in a circuit court,—and declare that, upon conviction thus had, his office should be deemed vacant, or that he should be suspended from a discharge of his official duties? And yet such legislation would be valid if that department of the Government can, at its option, change the provisions of the Constitution in reference to the mode of proceeding against the Governor, or any officer whose office is created by that instrument. Or suppose the legislature should attempt, by enactment, to empower the court, whenever in its judgment the public interest demanded it, to suspend any State officer whose term of office is fixed by the Constitution, and who is subject to impeachment from the performance of his official duties for such period as the court might deem proper,—would such enactment be regarded as constitutional? Most certainly not. And yet the reverse would be true if the power in question really existed.

In our opinion, the fact that the framers of Constitution inserted in that instrument the several provisions fixing the terms of the offices thereby created, and prescribing the grounds upon which and the modes whereby the incumbent of such offices may be removed, is altogether sufficient to warrant the conclusion that those subjects were fully considered by them, and that they intended, by embodying such provisions in the Constitution, to make them permanent, and fixed, and thus to place the subjects to which they relate altogether beyond legislative control."

In the recent case of Falloon *vs.* Clark, 61 Kas., 127, the question was before the supreme court of Kansas as to whether or not the legislature could provide for a different

mode for the suspension or removal of a constitutional officer in any other mode or manner than that provided by the constitution, and the court said that

"The constitution having prescribed the grounds for which a judge may be removed and the manner in which it may be done, is it competent for the legislature to provide that he may be removed for other reasons and in another manner?"

The court thereupon approves the case of Lowe *vs.* Com., 3 Metc., 237, and says:

"In Throop on Public Officers, sec 341, it is said to be well settled that where the constitution creates or recognizes an office, and declares that the incumbent may be removed *in a specified manner,* or for specified reasons, the legislature cannot constitutionally provide by statute for his removal for any other reason or in any other manner."

And the court further says, on page 128, that

*"Where the constitution plainly prescribes the grounds and method of removal it must be regarded as the paramount law, and not subject to be directly or indirectly changed or nullified by legislative enactment."*

The same question was before the Supreme Court of Kentucky in the case of Brown *vs.* Grover, 6 Bush (Ky.), 3, in which it was said that:

"The Constitution of the State has designated the causes for which sheriffs may be removed from office, and the mode in which it is to be done; consequently the legislature had no power to add other causes of removal, and prescribe other or different modes."

The Supreme Court of Maryland, in the case of Thomas *vs.* Owens, 4 Md., 190, said:

"Where the Constitution defines the qualifications of an officer, it is not within the power of the legislature to change or superadd to it, unless the power is expressly or by necessary implication given to it."

The question was again before the Supreme Court of Kentucky, in the case of Commonwealth *vs.* Williams, 79 Ky., 42-44, in which the court, among other things, said:

"The Constitution has designated the offenses for which certain public officers, including county judges, may be removed from office, and the legislature has no power to prescribe removal from office as a penalty for offenses not so designated. Nor can it, by declaring that a given offense shall be deemed one of a class of offenses for which an officer may be removed, make it of that class, and authorize the removal of an officer upon his conviction of such offense."

And this principle, so fundamental in our theory of government, was emphasized by the Supreme Court of California in the case of Sheehan *vs.* Scott, 145 Cal., 684, in which the Court said that:

"The Constitution of the state is not a grant of power, and the legislative power which is vested in the senate and assembly includes all the power not expressly prohibited to the legislature or elsewhere conferred. Though the legislature cannot increase or diminish the qualifications which the Constitution has prescribed for eligibility to the offices created by that instrument, nevertheless, for all offices which the legislature may authorize or establish, it may prescribe such qualifications as, in its judgment, will best accord with the public policy, or subserve the interests of those affected thereby."

And the Court, in the opinion, (p. 687) further said:

"It may be admitted that the legislature can neither increase nor diminish the qualifications which the Constitution has prescribed for eligibility to any of the offices created by that instrument."

The decisions cited *supra* were based upon a construction of state constitutions, which are not grants of power, like the Federal Constitution. It is fundamental that a state constitution is not a grant of "special, limited and *enumerated* powers," implying a negative of all others, as is the case with the Constitution of the United States. "The legislative

authority of a state is the right to exercise supreme and sovereign power, subject to no restrictions except those imposed by its own constitution, the Constitution of the United States of America, and by the laws and treaties made under it." This being the conceded rule, it is most pertinent here to ask what article—what section—what clause of the Federal Constitution, expressly or by necessary implication, empowered Congress to enact the statute of 1864, under which the indictment was found in the court below?

The Constitution will be searched in vain to find the power conferred upon Congress, expressly or by implication, to delegate to the Judiciary the power, by indictment or otherwise, to remove from office a United States Senator, or forever disqualify him from thereafter holding any office of honor or trust under the Constitution and laws of the United States.

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." (Art. 10, Amendts. to Constitution.)

By analogy, the case of Morris *vs.* Powell, 125 Ind., 287, is directly in point. In that case the court had under consideration the validity of a statute affixing other qualifications to an elector than those prescribed by the Constitution, and said: (p. 60.)

"The legislature has no such power. That when the people, by the adoption of the Constitution, have fixed and defined in the Constitution itself what qualifications a voter shall possess to entitle him to vote, the legislature cannot add an additional qualification, is too plain and well recognized for argument, or to need the citation of authorities. The principle is elementary that when the Constitution defines the qualifications of voters, that qualification cannot be added to or changed by legislative enactment."

Rison *vs.* Farr, 24 Ark., 161.

The Supreme Court of Pennsylvania, in the case of McAfferty *vs.* Guyer, 58 Pa. St., 109, said:

"A right conferred by the Constitution is beyond the reach of legislative interference. If it were not so, there would be nothing stable; there would be no security for any right. It is in the nature of a constitutional grant of power or privileges that it cannot be taken away by any authority known to government. It involves a prohibition of interference with it."

The Act of 1864 superadds disqualifications to those expressly contained in the Constitution, and prescribes a mode of procedure and a punishment not expressly authorized by the Constitution, or conferred by necessary implication. Indeed, the express power conferred is an implied prohibition against the exercise by Congress of that most extraordinary legislation,—the basis of this prosecution.

No legislation is "appropriate which should conflict with the implied prohibitions upon Congress. *They are as obligatory as the express prohibitions.*" (*Ex parte* Virginia, 100 U. S., 361).

When Senator Burton was chosen by the State of Kansas to represent it in the Senate of the United States, he was chosen for six years. He had all of the qualifications prescribed by the Federal Constitution. He was, and in the nature of things, only required to consult the organic laws as to his duties and obligations as a Senator. He had the constitutional right to hold the office for six years, subject only to the delegated, enumerated and express power of the Senate to expel him, and subject to the disqualifications provided in Section 6, Article 2, of the Constitution, that "no Senator * * * shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States which shall have been created, or the emoluments whereof shall have been increased during such time."

The Act of 1864 applies only to the conduct or action of

the Senator, as contradistinguished from the conduct or action of the citizen. It is a limitation and restriction upon the conduct and action of the Senator during his term of office, nowhere in the Constitution, expressly or by necessary implication, conferred upon Congress to create. The Senate, by and through the power delegated to it by the Constitution, might properly expel for doing of the things charged in the indictment, as a violation of senatorial dignity, but had Congress the power, by enactment, to make such acts and conduct of the *Senator* a crime, and delegate to the Judiciary the power to take from the *Senator* the rights and privileges guaranteed by the Constitution? The judgment of conviction not only imprisons him, but disqualifies him from holding the office for which he was chosen by the State of Kansas, for "six years."

Evidently Congress submitted to the people, for ratification, the Fourteenth Amendment, upon the theory that it had no constitutional power, by legislative enactment, to add to the disqualifications of the Senator. It is provided by Section 3, of the Fourteenth Amendment, that:

"No person shall be a Senator or Representative in Congress, or elector of President or Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability."

If such a restriction incorporated in a Statute would have been unconstitutional and void, as not being one of the *enumerated* powers of the Constitution, then most clearly the Act of 1864 was not within the purview of the Constitution of the United States.

In the case of U. S. *vs.* Harris, 106 U. S., 636, this Court

approved the language of Mr. Justice Story in his commentaries on the Constitution,—in which he said:

"Whenever, therefore, a question arises concerning the constitutionality of a particular power, the first question is whether the power be expressed in the Constitution. If it be, the question is decided. If it be not expressed, the next inquiry must be whether it is properly an incident to an express power, and necessary to its execution. If it be, then it may be exercised by Congress. If not, Congress cannot exercise it."

The framers of the Constitution were most careful to prescribe the powers of "each House," and the debates in the Constitutional Convention demonstrate that it was the purpose of the great men who participated in those debates to so form and frame and fashion that great instrument that neither House would have the power to trench upon the prerogative of the other. Therefore it was provided (Section 5, Article 1) that:

"*Each House* shall be the judge of the elections, returns and qualifications of its *own* members; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties, as *each* House may provide.

*Each* House may determine the rules of *its* proceedings, punish *its* members for disorderly behavior, and, with the concurrence of two-thirds, expel a member."

As was said in 1 Story on Constitution, Sec. 833, p. 584:

"It is obvious that a power must be lodged somewhere to judge of the elections, returns and qualifications of the members of *each* House composing the legislature; for otherwise there could be no certainty as to who were legitimately chosen members, and any intruder or usurper might claim a seat, and thus trample upon the rights and privileges and liberties of the people. Indeed, elections would become, under such circumstances, a mere mockery, and legislation the exercise of sovereignty by any self-constituted body. *The only possible question on such a subject is as to the body*

*in which such a power should be lodged. If lodged in any other than the legislative body itself, its independence—its purity—and even its existence and action may be destroyed or put into imminent danger.* No other body but itself can have the same motive to preserve and perpetuate these attributes; no other body can be so perpetually watchful to guard its own rights and privileges from infringement, to purify and vindicate its own characters, and to preserve the rights and sustain the free choice of its constituents. Accordingly, the power has always been lodged in the legislative body by the uniform practice of England and America."

In 1 Kent's Comm., 235, the learned author says, in discussing the Constitution of the United States:

"*Each* House is made the sole judge of the election and qualifications of its members. The same power is vested in the British House of Commons, and the legislatures of the several States; and *there is no other body known to the Constitution, to which such a power might safely be trusted;* * * * and as *each* House acts in these cases in a judicial character, its decisions, like the decisions of any other court of justice, ought to be regulated by known principles of law, and strictly adhered to, for the sake of uniformity and certainty."

People *vs.* Hall, 80 N. Y., 121.

By Article 6 of the Constitution, it is provided that:

"This Constitution and the laws of the United States which *shall be made in pursuance thereof,* * * * *shall be the supreme law of the land,"* etc.

In speaking of this clause, and the foresight which marks every clause of the instrument, Chief Justice Taney said: (21 How., 519).

"The sovereignty to be created was to be limited in its powers of legislation, and *if it passed a law not authorized by its enumerated powers, it was not to be regarded as the supreme law of the land; nor were the State judges bound to carry it into effect."*

If the act of 1864, under which the indictment was found, is to be regarded as the "supreme law of the land," what becomes of Section 5, Article 1, of the Constitution,—that "*each* House shall be the judge of * * * the qualifications of its *own* members"? It is utterly impossible to give force and effect to the plain meaning of this section, and at the same time force and effect to the act of 1864, as "the supreme law of the land."

Senator Burton has been convicted of a violation of this act, and fined and sentenced to imprisonment, and, by the judgment of the court, "rendered forever hereafter incapable of holding any office of honor, trust or profit under *the Government* of the United States." If this act of 1864 is constitutional, and the judgment of the court effective, then the Senate, by this act, has disqualified itself from exercising an express power conferred upon it by the Constitution, viz: that it should be "the judge of the elections, returns and qualifications of its *own* members" (Sec. 5, Art. 1). To illustrate,—Suppose that the people of the State of Kansas, notwithstanding such conviction, believing that it involved no moral turpitude, should, at the next session of the legislature, elect Senator Burton as his own successor, and send him to the Senate as its accredited agent and representative. Would not the Senate have the constitutional and lawful right,—being the sole judge of the election and qualifications of its members,—to admit him, notwithstanding the judgment of the court? If this question be answered in the negative, it follows necessarily that Congress, by the act of 1864, has deprived the Senate of a power expressly delegated and conferred upon it by the Constitution, and the exercise of which has ever been regarded as an essential prerogative of its very existence. If the question be answered in the affirmative, then the act of 1864 is not a law of the United States, "made in pursuance of the Constitution," and is *not* "the supreme law of the land."

Apply another test to the proposition. Suppose Senator

Burton, after having served his term of imprisonment, as fixed by the court, and before the expiration of his term of office, should enter the Senate chamber, and the Senator from Texas should object to Senator Burton exercising any of the duties or functions of a United States Senator, because, "after his election, and during his continuance in office," he had been convicted of a violation of the act of 1864, and, by the judgment of the court, he had been "rendered forever hereafter incapable of holding any office of honor, trust or profit under the Government of the United States." Would such objection be available, unless the Senate, exercising the express power conferred by the last clause of Section 5, Article 1, of the Constitution, "with a concurrence of two-thirds," expelled him?

Suppose the Senate, notwithstanding the judgment of the Court, believing it was wrong should refuse to expel Senator Burton. Could any one question the constitutional right and power of the Senate so to decide? If the Senate, under the power conferred by the Constitution, has such right and power, then the act of 1864 cannot be held to be the *"supreme law of the land."* In the very nature of things, it cannot be "the *supreme law of the land,"* if the Senate has the constitutional power to ignore and disregard the judgment of the court below. If the Senate has not the constitutional right and power to ignore and disregard the act of 1864, and the judgment of the court under it, in passing upon the qualifications of its members, it must be upon the theory alone that Congress, by the act of 1864, had the power to suspend and render inoperative Section 5, Article 1, of the Constitution of the United States.

The act of 1864, and Section 5, Article 1, of the Constitution, are wholly incompatible, and in irreconcilable conflict. It cannot be that the framers of the Constitution intended, by *express* grant, to confer upon *each* House the power to be the sole judge of the qualification of its *own* members, and, by *implication,* to confer the power upon both House and

Senate, by concurrent action, by statute, to disable and disqualify *each* House from exercising the powers thus *expressly* conferred.

In all of the debates in the Constitutional convention, such a contingency was not considered. Evidently, by the *express* grant conferred by the Constitution, the intention was to lodge the power in *each* House, to the exclusion of the other, upon the theory that, "if lodged in any other than the legislative body itself, its independence, its purity, and even its existence and action might be destroyed, or put into imminent danger. No other body but itself can have the same motives to preserve and perpetuate these attributes; no other can be so perpetually watchful to guard its own right and privileges from infringement, to purify and vindicate its own character, and to preserve the rights and sustain the free choice of its constituents. Accordingly, the power has always been lodged in the legislative body by the uniform practice of England and America."

The identical question was decided by Mr. Justice Brewer, when on the supreme bench of Kansas, in the case of State *vs.* Gilmore, 20 Kan., 554, in which was under consideration a section of the Constitution of the State of Kansas, exactly similar to the first clause of Section 5, Article 1, Constitution of the United States. He said:

"The Constitution declares, Article 2, Section 8, that 'Each House shall be judge of the elections, returns and qualifications of its own members.' This is a grant of power, and constitutes each House the ultimate tribunal as to the qualifications of its own members. The two Houses acting conjointly do not decide. Each House acts for itself, and by itself; and from its decision there is no appeal, not even to the two Houses. And this power is not exhausted when once it has been exercised, and a member admitted to his seat. It is a continuous power, and runs through the entire term. At any time, and at all times during the term of office, each House is empowered to pass upon the present qualifications of its own members. By Section 5 of the same Article, acceptance of a federal office vacates a member's seat. He

ceases to be qualified, and of this the House is the judge. If it ousts a member on the claim that he has accepted a federal office, no court or other tribunal can reinstate him. If it refuses to oust a member, his seat is beyond judicial challenge. This grant of power is, in its very nature, (and so as to any other disqualification), exclusive; and it is necessary to preserve the entire independence of the two houses. Being a power exclusively vested in it, it cannot be granted away or transferred to any other tribunal or officer. It may appoint a committee to examine and report, but the decision must be done by the House itself. It, and it alone, can remove. Perhaps, also, it might delegate to a judge or other officer outside its own body power to examine and report upon the qualifications of one of its members. But neither it, nor the two houses together, can abridge the power vested in each House separately of a final decision as to the qualifications of one of its members, or transfer that power to any other tribunal or officer. And an act which purported to grant to the District Court power to remove from office must be construed as not embracing members of the legislature; or if its language specifically names, or necessarily includes them, then as to them the act is unconstitutional."

Again, in the case of State *vs.* Tomlinson, 20 Kan., 703, Chief Justice Horton, Mr. Justice Brewer concurring, said:

"Within certain constitutional restrictions, the executive, legislative and judicial powers of the state, are independent and supreme; and neither has the right to enter upon the exclusive domain of the other. We should be passing beyond the limits of our own power to judge of the election or qualification of a member of the legislature; and as the constitution has expressly confided this power to another body, we must leave it where it has been deposited by the fundamental law."

In the case of Robertson *vs.* State, 109 Ind., 92, it was said that:

"When the Constitution confides to a legislative body the power to judge of the election and qualification of its own members, the exercise of that power belongs exclusively to the

body to which it is committed, and so it is not the subject of review in the courts, or by any other body."

State *vs.* Baxter, 28 Ark., 129.

It is well settled that Section 5, Article 1, providing that "Each House shall be the judge of the elections, returns and qualifications of its *own* members," confers upon "*each* House" powers of a judicial nature,—in the exercise of which its decision is conclusive, and not subject to review by the courts.

People *vs.* Mahoney, 13 Mich., 482.

In the case of Dalton *vs.* State, 43 Oh. St., 680, the Court said:

"The jurisdiction of each House to decide upon the election, returns and qualifications of its own members is supreme and exclusive."

In Cooley on Constitutional Law, (5th ed., p. 753), it is said that:

"Wherever the Constitution has prescribed the qualifications of electors, they cannot be changed or added to by the Legislature, or otherwise than by an amendment of the Constitution."

See also the following New Jersey cases:

Allison *vs.* Blake, 57 New Jersey Law, 8-11 (1894).
Kimball *vs.* Hendee, 57 New Jersey Law, 207 (1894).

In the case of Gibbons *vs.* Ogden, 8 Wheat., 1, 188, Chief Justice Marshall said:

"The enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they said."

If the act of 1864 is the "supreme law of the land," by it Congress has surrendered the express grant of power that

each House shall be the judge of the qualifications of its *own* members, and delegated the power thus conferred to the judiciary. Under the authorities cited *supra*, this express grant of power is exclusive in each House, and cannot be delegated,—for, as said by Mr. Justice Brewer in the case of State *vs.* Gilmore, 20 Kan., 554:

"It is a continuous power, and runs through the entire term. At any time, and at all times during the term of office, each House is empowered to pass upon the *present* qualifications of its *own* members. * * * This grant of power is, in its very nature (and so as to any other disqualifications) exclusive; and it is necessary to preserve the entire independence of the two Houses. Being a power exclusively vested in it, it cannot be granted away or transferred to any other tribunal."

If, therefore, the Senate has *now* the power to pass upon the alleged disqualification, as it certainly has under the Constitution, the act of 1864 is not the "supreme law of the land," and was not passed "in pursuance of the Constitution of the United States," and is absolutely null and void. In order to be "the supreme law of the land," the Senate, the House, the Courts, and every person, must yield obedience to its mandates, and the Senate is conclusively bound, by the judgment of the court below, that Senator Burton is "rendered forever hereafter incapable of holding any office of honor, trust or profit under the government of the United States;" and, although a member of the United States Senate, that body can do no act in the premises but register the judgment and mandate of the court.

A jury of twelve men has found Senator Burton disqualified, and rendered him hereafter forever incapable of holding "the office of United States Senator," and the Senate has had no voice in the matter, although its constitutional power "is a continuous power, and runs through the entire term," * * * and it is "empowered," by the Constitution, "at any time and at all times," to "pass upon the present qualifications of its own members."

But there is another view of the question which clearly demonstrates that the act of 1864 is in irreconcilable conflict with the Constitution, and that it is not the "supreme law of the land." It is provided by the last part of the first clause of section 5, article 1, Constitution of the United States, that:

"A smaller number may adjourn from day to day, and *may be authorized to compel the attendance of absent members, in such manner, and under such penalties, as each House may provide.*"

The sentence and judgment of the court below is that Senator Burton shall "be imprisoned for the period of six months in the county jail at Ironton, in the County of Iron, and State of Missouri." Senator Burton, during the six months' imprisonment, is the accredited agent and representative of a sovereign State, in the Senate of the United States. The Senate, with the exclusive power conferred by the Constitution of the United States to judge of his qualifications, and, "with the concurrence of two-thirds," to expel him, has not acted. The presence of Senator Burton in the Senate is necessary to make a quorum, and, without his presence, a quorum cannot be secured. The Senate has the constitutional power to "compel the attendance," but when it comes to exercise this power, it is confronted with the act of 1864, by which this power has been abdicated, and the power delegated to the judiciary to place an insurmountable obstacle in the way of the Senate, in the exercise of its constitutional prerogative.

"Whenever, therefore, a question arises concerning the constitutionality of a particular power, the first question is whether the power be expressed in the Constitution. If it be, the question is decided. If it be not expressed, the next inquiry must be whether it is properly an incident to an express power, and necessary to its execution. If it be, then it may be exercised by Congress. If not, Congress cannot exercise it." (U. S. *vs.* Harris, 106 U. S., 636, cited *supra.*)

If the act of 1864 is the "supreme law of the land," it must be held to be paramount to the Constitution, and that great instrument the "baseless fabric of a dream." The act of 1864 is aimed at the conduct of "the *Senator*." It fixes his status, provides what he may *not* do "during the continuance of his term of office," and defines his disqualifications. It prescribes a rule of action for "each House," which, if "the supreme law of the land" subordinates to its mandates three clauses of section 5, article 1, Constitution of the United States, viz:

First: Each House shall be the judge of the qualifications of its *own* members.

Second: Each House may be authorized to compel the attendance of absent members, in such manner, and under such penalties, as each house may prescribe.

Third: Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.

We will apply another test. Under the act of 1864, the judgment of conviction renders Senator Burton "forever hereafter incapable of holding any office of honor, trust or profit under *the Government* of the United States." If the act of 1864 is constitutional, and "the supreme law of the land," the judgment must necessarily, of itself, operate to vacate the office of Senator Burton the very moment it was rendered. It makes no provision for any action on the part of the Senate to rid itself of the convicted Senator. The Constitution (Sec. 5, Art. 1) provides that:

"If vacancies happen by resignation *or otherwise* during the recess of the Legislature of any State, the Executive thereof may make temporary appointments until the next meeting of the Legislature, which shall then fill such vacancies."

In the eye of the law, an office is "vacant" "whenever it is unoccupied by a legally qualified incumbent, who has a *lawful right to continue therein until the happening of some future event.*"

If the judgment of the court below operates to create a "vacancy," then clearly the executive of Kansas has the constitutional power (Sec. 5, Art. 1, Constitution) to fill such vacancy until the next meeting of the legislature. Suppose he should do so. Would not the Senate have the constitutional power, notwithstanding the act of 1864, and the judgment of conviction thereunder, to determine for itself whether the judgment created a vacancy, and whether or not Senator Burton was disqualified to further hold the office, regardless of the judgment? If this question be answered in the affirmative, then upon what theory can it be contended that the act of 1864 was passed in pursuance of the Constitution, and is "the supreme law of the land"?

In the case of Kilbourn *vs.* Thompson, 103 U. S., 190, Mr. Justice Miller, speaking for this Court, said:

"It is believed to be one of the chief merits of the American system of written constitutional law that all the powers intrusted to government, whether state or national, are divided into the three grand departments,—the executive, the legislative and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons intrusted with power in any one of the branches shall not be permitted to encroach upon the powers confided to the others, but that *each* shall, by the law of its creation, *be limited to the exercise of the powers appropriate to its own department, and no other.* * * * In the main, however, that instrument,—the model on which are constructed the fundamental laws of the States,—has blocked out with singular precision, and in bold lines, in its three primary articles, the allotment of powers to the executive, the legislative and the judicial departments of the government. It also remains true, as a general rule, that the powers confided by the Constitution to one of these departments cannot be exercised by the other."

Under the act of 1864, Congress has attempted to delegate to the judiciary the power to determine whether a Senator has violated his obligation, *as such*, and if found guilty, to imprison him, and disqualify him from ever "hereafter holding any office of honor, profit or trust under *the government* of the United States."

If Congress can thus delegate the power of each, or either, House to the judiciary, then the Senate could do so, without the concurrence of the House, for the power conferred by the Constitution, so far as the *Senator* is concerned, is vested exclusively in the Senate by the Constitution.

There is another view of the act of 1864 which, by analogy, would seem to be conclusive of the contention that it is unconstitutional.

It is provided by section 4, article 2, of the Constitution that:

"The President, Vice-President, and all civil officers of the United States, shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors."

The maxim of English constitutional law—that the "King can do no wrong"—has no application to our system and theory of government. It can not apply to the President, "because the Constitution admits that he may do wrong, and has provided, by the proceeding of impeachment, for his trial for wrong-doing, and his removal from office if found guilty."

Would any one seriously contend that the act of 1864 could, under the Constitution, be made applicable to the President of the United States? There is no express or implied power in the Constitution for any such legislation. It would be in conflict with the spirit and genius of our institutions. And yet, in a sense, the Senate is a part of the executive power of the government. The President has power to make treaties, "provided two-thirds of the Senators present concur." The President may "nominate, and, by and with

the consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, etc." The powers of the President are limited and circumscribed, except with the "advice and consent of the Senate."

It is said in the Federalist, vol. 2, p. 856, that:

"The Senate is an independent branch of the Legislature,—a court for trying impeachments, and *also a part of the executive*, having a negative in the making of all treaties, and in appointing all officers."

The Constitution prescribes the qualifications of the President, the same as it does those of the Senator. "Judgment in cases of impeachment shall not extend further than to removal from office, and the disqualification to hold and enjoy any office of honor, trust or profit under the United States, etc." Neither the Senate nor the House is the judge of the qualifications of the President, as in case of their *"own members."* Has Congress the power, either express or implied, to superadd to the qualifications of the President? Would Congress have the power, under the Constitution, to make *any* act of the President a statutory offense, punishable by fine and imprisonment, and disqualification to hold office? And yet, there is more warrant for such a law in the Constitution than there is for the act of 1864. The President may be impeached. The Senator may not be. The Senator may be expelled, "with the concurrence of two-thirds" of the Senators, whether guilty of any crime or not. "The President, Vice-President, and all civil officers of the United States, shall be removed from office on impeachment for *and* conviction of treason, bribery, or other high crimes and misdemeanors."

It may be conceded that, under Section 3, Article 3, of the Constitution, "Congress shall have the power to declare punishment of treason, etc.," but beyond that, and the judgment following impeachment (Section 3, Article 1, Constitution), it may no go in prescribing penalties against the President.

The Constitution has created the three co-ordinate departments of the government, and the limitations and restrictions are immutably fixed as to each by the Constitution. The Senator cannot be impeached, because he is a member of the only constitutional tribunal created for that purpose, but, as a substitute for impeachment, he may, "with the concurrence of two-thirds" of the Senate, be expelled.

It will doubtless be said that a Senator is amenable to the law, and that the fact that he is Senator does not give him immunity. That is unquestionably true. He may be arrested and convicted of murder, robbery, arson or larceny, or any other statutory crime. So may the President, or a Justice of the Supreme Court. A State, under its reserved power, may prosecute any one for murder,—the President,—a Senator,—a Justice of the Supreme Court,—and so may the federal government, under any statute passed in pursuance of the Constitution. Section 6, Article 1, by implication, if not expressly, so provides. But there is a marked distinction between the violation of a criminal statute by *the man* and by *the Senator*. If the act of 1864 was intended to discipline the Senator, it divests the Senate of its constitutional prerogative. If it was intended for the purpose of protecting the departments from the insidious influence of the Senator, it cannot accomplish that result by usurping the constitutional power of each House.

The act of 1864 is wholly unlike the act of Congress under consideration by this Court *in re* Chapman, 166 U. S., 664, but in which it was conceded by Chief Justice Fuller (p. 669):

> "The right to expel extends to all cases where the offense is such as, in the judgment of the Senate, is inconsistent with the trust and duty of a member."

It cannot be said in this case, as in that, that the act of 1864 was "necessary and proper for carrying into execution the powers vested in Congress, and in each House thereof" (166 U. S. 671), for, in commenting on the resolution to

expel William Blount from the Senate, in July, 1797, Mr. Sergeant says, in his work on Constitutional Law (2nd ed., p. 302):

"In the resolution the Senate declared him guilty of a high crime and misdemeanor, though no presentment or indictment had been found against him, and no prosecution at law was ever commenced upon the case. *And it seems no law existed to authorize such prosecution.*"

"The two Houses of Congress have several times acted upon this rule of law," says Chief Justice Fuller (166 U. S., 670), "and the cases may be found, together with debates on the general subject, in both Houses, of great value, in Smith's Digest of Decisions and Precedents, Senate Document No. 278, 53rd Congress, 2nd Session."

It will doubtless be contended that Senator Burton is not disqualified by the judgment of the court from holding the office of United States Senator, for the reason that the office of United States Senator is not an "office of honor, trust or profit under the *Government of the United States.*" Mr. Story, in his work on the Constitution, vol. 1, sec. 793, p. 559, referring to the attempted impeachment of Senator Blount, says that a question arose "upon an impeachment before the Senate in 1799, whether a Senator was a 'civil officer' of the United States, *within the purview of the Constitution*, and it was decided by the Senate that he was not; and the same principle must apply to the members of the House of Representatives. This decision, upon which the Senate itself was greatly divided, seems not to have been quite satisfactory (as it may be gathered) to the minds of some learned commentators. The reasoning by which it was sustained in the Senate does not appear, but it was probably held that 'civil officers of the United States' meant such as derived their appointment from and under the national government, and not those persons who, *though members of the government*, derived their appointment from the States, or the people of the State."

The act of 1864 uses the words "under the *government* of the United States." Is not the Senate a part of the *government* of the United States? Section 1, article 1, of the Constitution provides that:

"All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Section 3, article 1, provides that:

"The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six years."

Is not the office of Senator one of "profit," under *the government* of the United States? The question is answered in the affirmative by section 6, article 1, Constitution, which provides that:

"The Senators * * * shall receive a compensation for their services, to be ascertained by law, and paid out of the Treasury of the United States."

If, under the judgment of the court below, he is "rendered forever thereafter incapable of holding *any* office of * * * *profit* under *the government* of the United States," may the Treasurer of the United States continue to pay to Senator Burton "compensation" for his services, *as such*, until the expiration of his term as Senator? It is true that the Senator is chosen by the State, and is its accredited representative in the Senate, but the *office* of Senator is created by the Constitution, and the people—not the States—created the Constitution. The preamble to the Constitution provides that:

"We, the people of the United States, * * * do ordain and establish this Constitution for the United States of America."

By that Constitution was created *a government*, with three co-ordinate branches,—the legislative, the judicial and the ex-

ecutive,—and every office necessary, expressly or by implication, to constitute either branch of the government is an "office of honor, profit or trust" under that government.

A State cannot superadd qualifications of a Senator to those prescribed by the Constitution of the United States, so that, where a State constitution provided that judges of the Supreme Court should not be eligible to any office of public trust or profit in the United States during the term for which they were elected, one who had been elected Judge of the Supreme Court for a term of nine years, but resigned the office, and was subsequently, and during the terms for which he was elected, elected Senator, was held entitled to his seat.

*In re* Trumbull, Taft Elec. Cases, p. 148.

One who is an inhabitant of a State at the time of his election as Senator, having the other qualifications prescribed by the Constitution, is eligible to a seat in the Senate.

Ames, Taft Elec. Cases, p. 317.

A State, therefore, has no voice whatever, under the Constitution, in prescribing the qualifications of the Senator. The Senator must be chosen in the manner prescribed by the Constitution. The Senate, under the Constitution, as has been shown, becomes a part of the executive branch of the government. Treaties cannot be made without its consent. "Ambassadors, other public ministers and consuls, Judges of the Supreme Court, and all other officers of the United States, etc.," can only be appointed "by and with the consent of the Senate." Without the active co-operation of the Senate, the wheels of "government" would stop.

It is provided by Section 3, Article 6, of the Constitution, that:

"The Senators and Representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation, *to support this Constitution;* but no religious test shall ever be

required as a qualification to any office or public trust under the United States."

"It has been asked (Rawle on Const., p. 191) why it was thought necessary that the State magistracy should be bound to support the Constitution of the United States, and unnecessary to impose an oath on the officers of the United States in favor of the State constitutions. The reasons assigned (as one of many) by the authors of the Federalist is that the members of the general government will have no agency in carrying the State governments into effect, but the members of the State governments will have an essential agency in giving effect to the general government.

The answer is a solid one. An official oath ought to be confined to the duties of the office. * * * An officer appointed under the authority of the United States is to perform only those duties which emanate from it; his obligation is limited by that authority, which, as repeatedly heretofore observed, is not controlled by the constitutions of the several States."

The Senator is not required to take an oath to support the Constitution of the State. Therefore, can it be claimed, with any degree of reason, that a Senator does not hold an "office of honor, profit or trust under *the government* of the United States," and that the judgment of the court below does not disqualify Senator Burton from continuing to hold the office? Was that not the clear and manifest intention of Congress by the act of 1864? Is it fair to assume that Congress intended, by that act, to disable a Senator convicted of its violation "forever thereafter from holding any office of honor, profit or trust under *the government* of the United States," and *as Senator*, exclude him from its operation, and effect, and permit him, during his term of office as Senator, to assist in making treaties, and consenting to the appointment of officers to hold office that he was himself disqualified from holding?

It will doubtless be conceded that the judgment of conviction, if the act of 1864 is valid, forever disqualified Senator Burton from holding the office of judge of any federal court; yet, if it does not affect his status as a Senator, then

he may consent, *as Senator,* to the appointment of Judge, at the same time not eligible himself to the position. He may, *as Senator,* be a member of the impeachment tribunal before which may be tried the President of the United States, and his vote may be the one vote necessary to remove the President from office, and disqualify him "to hold and enjoy any office of honor, trust or profit under the United States;" and yet he himself be disqualified, under the act of 1864, from holding any office under "the *government* of the United States," except that of Senator, if the judgment does not disqualify him as such.

We desire to specially call the attention of the Court to the language of the statute, viz: "office of honor, profit or trust under *the government* of the United States." Under the clause in the Constitution (Sec. 3, Art. 1), referring to the judgment in cases of impeachment, the language used is "disqualification to hold and enjoy any office of honor, trust or profit under the *United States.*"

There is a broad distinction between "*the government* of the United States" and the "United States." It will not be contended, we think, that "*the government* of the United States" does not include the Senate of the United States, for the Senate is as essential to our theory of government as the executive or judiciary. In fact, a more important part of *the government* than the heads of departments.

Senators and Representatives are not amenable to impeachment under the Constitution, because the House is given the sole power to impeach, and the Senate the "sole power to try all impeachments;" and hence some commentators on the Constitution have reached the conclusion that a Senator was not a "civil officer of the United States."

But let it be conceded, for the purpose of the argument, that a Senator is not a "civil officer of the United States," but an officer of a sovereign State, because he is chosen by the State Legislature, and derives no authority from the United States; then he is responsible "to the power that gave him authority, and not to the government of which he is

part, and which could give him no authority;" and Congress would have no constitutional power, express or implied, *by legislation*, to control his actions or conduct *as Senator*.

If the Senator is a State officer, and the act of 1864 is constitutional, then Congress would have the power to make the same applicable to the Governor of each sovereign State. Suppose the act of 1864 read: "No Senator, no Governor, etc., of any State, after his election, and during the continuance of his term, etc.,"—there is no apparent reason why it would not be as valid, when invoked against the "Governor" as when invoked against the "Senator," *if* the Senator is a State officer, and *as such* does not hold "any office of honor, profit or trust under *the government* of the United States."

In the case of Comm. of Kentucky *vs.* Dennison, 24 How. (U. S.), 107, Chief Justice Taney said:

"And we think it clear that the federal government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it. * * * It is true that Congress may authorize a particular State officer to perform a particular duty; but if he declines to do so, it does not follow that he may be coerced, or punished for his refusal."

If, therefore, a Senator is not an officer of the United States in the sense of the Constitution, clearly he may not be coerced, or punished for his refusal to obey the requirements of an act of Congress relative to the discharge of his duties as United States Senator.

U. S. *vs.* Germain, 99 U. S., 510,
U. S. *vs.* Mouat, 124 U. S., 307,
U. S. *vs.* Smith, 124 U. S., 532,
*In re* Greene, 134 U. S., 377,
McPherson *vs.* Blacker, 146 U. S., 35-36.

As the accredited agent and representative of a sovereign State in the Senate of the United States, while he is amenable

like every other citizen, to the laws of the land, yet, *as Senator,* and in the discharge of his official duties, he is responsible alone to the Senate, and the constituency he represents. The House of Representatives, neither alone nor conjointly with the Senate, can prescribe for him a rule of action.

But for the purposes of this case, it is quite immaterial whether the Senator is a State officer, or, *as such,* holds an "office of honor, profit or trust under the government of the United States." In either case, the act of 1864 is not "necessary or proper for carrying into execution" the express grants of power conferred by the Constitution, and is not, and in the very nature of things cannot be, "the supreme law of the land."

Evidently the Senate of the United States, almost from the date of its creation, has entertained the conviction, disclosed by many precedents, that it had the constitutional power to punish its own members for "high crimes and misdemeanors," or any dereliction of duty, in the absence of a criminal statute on the subject (as in the case of Senator Blount), and before a conviction in the courts of a violation of a criminal statute (as in the case of Senator Smith).

If, therefore, it be conceded, as we think it must be, that, by express grant, the Senate had the constitutional power to punish Senator Burton for doing those things prohibited by the act of 1864, in the absence of such statute, that power is exclusive, and the act of 1864 was neither "necessary or proper for carrying into execution" such express grant of power.

No one, we think, will seriously contend that there is in the Constitution any *express* authority for the act of 1864, and it can only be justified upon the theory that it is "necessary and proper" legislation, to effectuate the powers *expressly* granted. It cannot be justified upon the theory that it was "necessary and proper" in order that the departments might be protected from the undue influence of the Senator, for the Senate has the *express* power, conferred by the Constitution, to control the actions of the Senator, by expulsion if

necessary, "with the concurrence of two-thirds;" and, in inflicting such punishment, the concurrence of the House is not required. Indeed, the interference or voice of the House is *expressly prohibited.*

The act of 1864 is not "appropriate" legislation to accomplish the apparent purpose and design of Congress, for the manifest reason that if the Senator is an officer of the government of the United States, the judgment of the court below forever hereafter renders Senator Burton "incapable of holding *any* office of honor, profit or trust under *the government* of the United States;" but the Senate *may*, under the Constitution, *ignore* and *reverse* that judgment, by holding him, not only qualified, but a suitable and proper person to continue to hold and discharge the duties of the office of Senator of the United States during the term for which he was elected.

If the Senator is not an officer of the United States, but of the State, and in disabling Senator Burton, by the judgment, from holding any "office of honor, profit or trust under *the government* of the United States," he is not rendered ineligible to hold and discharge the duties of United States Senator, the Senate *may*, in the exercise of its constitutional prerogative, ignore the judgment of the Court, and permit a Senator, *who cannot be recalled by the State*, to continue to discharge the functions of that great office, although forever rendered infamous by the judgment of the Court.

It is not a legitimate answer to this proposition to say that the Senate will not tolerate in its midst a Senator who has been thus discredited. The question is, has the Senate the constitutional right to ignore the judicial proceedings? Such proceedings were not *necessary* to aid the Senate in securing information. "*Each House* may determine the rule of its proceedings, etc."

Kilbourn *vs.* Thompson, 103 U. S., 190.

"Each House" has the power to summon witnesses, and the same power as the courts to enforce its mandates, and

may determine for itself the same question which Congress, by the act of 1864, has attempted to delegate to the judiciary to determine.

*In re* Chapman, 166 U. S., 661.

If the jury in the Court below had found Senator Burton not guilty, as charged, would such acquittal preclude the Senate from investigating the accusation, and expelling him from the Senate? If this question be answered in the negative, then he may twice be put in jeopardy for the same offense, and the act of 1864 would not be the "supreme law of the land," for the Senate, exercising its constitutional prerogative, would, in not recognizing the judgment of acquittal, ignore and disregard the law under which the judgment of acquittal was rendered. If the question be answered in the affirmative, then necessarily the act of 1864 would be held paramount to the express provision of the Constitution, and the Senate thereby divested of its constitutional prerogative to be the sole judge of the "qualifications of its *own* members," and the constitutional right to expel one of its "*own* members," "with the concurrence of two-thirds." If the Senate has the jurisdiction, under the Constitution, to thus deal with "its *own* members," it is not reasonable to believe that it was ever intended by the framers of the Constitution that the two Houses conjointly could divest the Senate of that power—of that jurisdiction,—and transfer it to any other body or tribunal.

As said by Chief Justice Fuller, *In re* Chapman (166 U. S., 668-669), the Senate "necessarily possesses the inherent power of self-protection;" and, speaking further of the *constitutional* power of the Senate, said:

"Nor will it do to hold that the Senate had no jurisdiction to pursue the particular inquiry, because the preamble and resolutions did not specify that the proceedings were taken for the purpose of censure or expulsion, if certain facts were disclosed by the investigation. *The matter was within the range of the constitutional powers of the Senate.* The reso-

lutions adequately indicated that the transactions referred to were deemed by the Senate reprehensible and deserving of condemnation, and punishment. *The right to expel extends to all cases where the offense is such as, in the judgment of the Senate, is inconsistent with the trust and duty of a member.*"

It is well settled that a written Constitution must be interpreted and effect given to it as the paramount law of the land, equally obligatory upon the Legislature as upon other departments of government and individual citizens, according to its spirit and the intent of its framers, as indicated by its terms. An act violating the true intent and meaning of the instrument, although not within the letter, is as much within the purview and effect of a prohibition as if within the strict letter; and an act in evasion of the terms of the Constitution, as properly interpreted and understood, and frustrating its general and clearly expressed or necessarily implied purpose, is as clearly void as if in express terms forbidden.

And it is equally well settled that:

"Where the means for the exercise of a granted power are given, no other or different means can be implied, as being more effectual or convenient."

Cooley on Constitutional Limitations, 7th ed., p. 98.

"The impeachment of a legislator (Story on Const. Vol. 1, Sec. 795, p. 561) for his official acts has hitherto been unacknowledged, as matter of right, in the annals of England and America.

"A silence of this sort is *conclusive* as to the state of public opinion in relation to the impolicy and danger of conferring the power."

If, therefore, a legislator cannot be impeached, and the Constitution has expressly conferred upon "each House" the power to punish for any official act, does it not follow that Congress has no implied power to directly or indirectly divest either House of its constitutional prerogative, whether the

Senator is an officer of the State or of "*the government* of the United States"?

We do not contend that Senator Burton is not amenable to the law, like every other citizen, or that the fact that he is a Senator absolves him from obedience to the Constitution of the United States, and laws passed in pursuance thereof; but we do claim that Congress has no constitutional power, by legislation, to place any limitations or restrictions upon his official conduct *as Senator*, and make, by force of the statute, such conduct a crime which would not be a crime if he were not a Senator.

The debates in the Constitutional Convention,—the discussions of the Constitution before it was ratified by the States,—the observations of all commentators upon the Constitution,—lead irresistibly to the conclusion that it was never intended to confer any such power upon Congress.

Mr. Jay, in discussing the duties and obligations of the President and the Senate, and the security the people had from fraud and corruption, said: (The Federalist, Vol. 1, p. 357, No. 44).

"With respect to their responsibility, it is difficult to conceive how it could be increased. Every consideration that can influence the human mind,—such as honor, oaths, reputation, conscience, the love of country, family affection and attachments,—afford security for their fidelity."

The power of "each House" to judge of the qualifications of its *own* members, and to establish rules for its proceedings,—to punish members, and, "with the concurrence of two-thirds," expel a member, is not strictly speaking a legislative, but a *judicial* function, and, unless the act of 1864 can be said to be "necessary and proper for carrying into execution" these functions, it is manifestly unconstitutional.

Mr. Madison says that: (The Federalist, Vol. 1, p. 273, No. 48).

"It is agreed on all sides that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. *It is equally evident that, in reference to each other, neither of them ought to possess, directly or indirectly, an overruling influence in the administration of their respective powers. It will not be denied that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned it.*"

In the case of Marbury *vs.* Madison, 1 Cranch, 391, Chief Justice Marshall said that:

"That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designated to be permanent.

This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the Legislature are limited and defined; and that those limits may not be mistaken, or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between governments with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it; or, that the Legislature may alter the Constitution by an ordinary act.

Between these alternatives there is no middle ground. The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary

legislative acts, and, like other acts, is alterable when the Legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written Constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

Certainly all those who have framed written Constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be that an act of the Legislature, repugnant to the Constitution, is void.

This theory is essentially attached to a written Constitution, and is consequently to be considered, by this Court, as one of the fundamental principles of our society. It is not, therefore, to be lost sight of in the further consideration of this subject.

If an act of the Legislature, repugnant to the Constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So, if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If, then, the courts, are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.

Those, then, who controvert the principle that the Constitution is to be considered, in court, as a paramount law, are

reduced to the necessity of maintaining that courts must close their eyes on the Constitution, and see only the law.

The doctrine would subvert the very foundation of all written Constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet in practice completely obligatory. It would declare that if the Legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the Legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions, a written Constitution, would of itself be sufficient in America, where written Constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the Constitution of the United States furnish additional arguments in favor of its rejection."

Mr. Tucker, in his work on the Constitution, (Vol. 1, p. 368), most forcibly says that: "The law necessary to carry into execution a principal power should be plainly ancillary to such power, and it should be enacted, because, without it, or some like means, the principal power would cease to be. No means, so selected, should be for itself as an independent exercise of power, but should be selected *bona fide* by the legislative power as one of the indispensable methods by which the existence of the principal power should be preserved. It must not be enacted to accomplish an end not within the grant of powers, or adopted for some other purpose under the deceptive pretext of being a means to an execution of some granted powers."

See remarks of Chief Justice Marshall, in the case of McCulloch *vs.* Maryland, 4 Wheat., 316, wherein he said that:

"Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution; or should Congress, under the *pretext* of executing its powers, pass laws for the acomplishment of objects not entrusted to

the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land."

*The nature of the employed power exercised as a means must be legitimate; in other words, no power will be employed as a means to an end which is not legitimate; that is, not within the powers granted by the Constitution. The ancillary legislation must be a necessary and proper means to accomplish an end which is clearly constitutional.*

This Court, at an early day, in the case of Anderson *vs.* Duan, 6 Wheat., 233,—in discussing the *express* powers conferred by the Constitution upon "*each* House," with reference to its *own* members,—said:

"The truth is that the exercise of the powers given over their *own* members was of such a delicate nature that a constitutional provision became necessary to assert or communicate it. Constituted as that body is, of the delegates of confederated States, some such provision was necessary to guard against their mutual jealousy, since every proceeding against a representative would indirectly affect the honor or interest of the State which sent him."

It is therefore fair to assume that the *express* power conferred excludes the idea of any *implied* power not necessary and proper for carrying into execution the express power.

In *Ex parte* Yerger, 8 Wall., 101, it was said that:

"The great and leading intent of the Constitution and the law must be kept constantly in view, upon the examination of every question of construction."

If the act of 1864 is sustained, as being within the purview of the Constitution, it will be possible for Congress, by legislation, to deprive "each House" of the powers the framers of the Constitution thought so necessary to preserve, protect and maintain the autonomy of each. By acting with the House of Representatives, and giving its consent to the act of 1864,

the Senate gave to the House a voice in judging as to the qualifications of its "own members," and delegated to the judiciary the power (by fine,—by imprisonment,—by rendering judgment of disqualification), to place an impediment to the free exercise by the Senate of Constitutional prerogatives, wisely intended for its own protection.

The report of the committee of the Senate, *in re* the resolution to expel Senator Smith, of Ohio, charged with being associated with Aaron Burr in a conspiracy against the government, presents, it seems to us, an unanswerable argument against the validity of the act of 1864. Among other things the committee said that:

"By the letter of the Constitution, the power of expelling a member is given to each of the two Houses of Congress, without any limitation other than that which requires a concurrence of two-thirds of the votes to give it effect.

"The spirit of the Constitution is perhaps in no respect more remarkable than in the solicitude which it has manifested to secure the purity of the Legislature by that of the elements of its composition. A qualification of age is made necessary for the members to insure the maturity of their judgment; a qualification of long citizenship to insure a community of interests and affections between them and their country; a qualification of residence to provide a sympathy between every member and the portion of the Union from which he is delegated; and to guard, as far as regulation can guard, against every bias of personal interest, and every hazard of interfering duties, it has made every member of Congress ineligible to office which he contributed to create, and every officer of the Union incapable of holding a seat in Congress. Yet, in the midst of all this anxious providence of legislative virtue, it has not authorized the constituent body to recall in any case its representative. It has not subjected him to removal by impeachment; and when the darling of the people's choice has become their deadliest foe, can it enter the imagination of a reasonable man that the sanctuary of legislation must remain polluted with his presence until a court of common law, with its pace of snail, can ascertain whether this crime was committed on the right or on the left bank of a river; whether a puncture of difference can be found between

the words of the charge and the words of the proof; whether the witnesses of his guilt should or should not be heard by his jury; and whether he was punishable because present at an overt act or intangible to public justice because he only contrived and prepared? Is it conceivable that a traitor to that country which has loaded him with favors, guilty to the common understanding of all mankind, should be suffered to return unquestioned to that post of honor and confidence where, in the zenith of his good fame, he had been placed by the esteem of his countrymen, and in defiance of their wishes, in mockery of their fears, surrounded by the public indignation, but inaccessible to its bolt, pursue the purposes of treason in the heart of the national councils? Must the assembled rulers of the land listen with calmness and indifference session after session to the voice of notorious infamy until the sluggard step of municipal justice can overtake his enormities? Must they tamely see the lives and fortunes of millions, the safety of present and future ages, depending upon his vote recorded with theirs, merely because the abused benignity of general maxims may have remitted to him the forfeiture of his life? Such, in very supposable cases, would be the unavoidable consequences of a principle which should offer the crutches of judicial tribunals as an apology for crippling the Congressional power of expulsion. Far different, in the opinion of your committee, is the spirit of our Constitution. They believe that the very purpose for which this power was given was to preserve the Legislature from the first approaches of infection; that it was made discretionary because it could not exist under the procrastination of general rules; that its process must be summary, because it would be rendered nugatory by delay."

It is true that Senator Smith was then under indictment for treason, but the Constitution (Sec. 3, Art. 3), expressly confers upon Congress the "power to declare the punishment of treason," but such declaration by Congress was not "necessary" for "carrying into execution" the express power of the Senate to judge as to the qualifications of "its own members," and, "with the concurrence of two-thirds," expel a member.

The accusation against Senator Burton has been pending for nearly two years. It is a matter of general public knowl-

edge that Senator Burton, recognizing the proprieties of the situation, being charged with a crime, the conviction of which renders him infamous, has not occupied his seat in the Senate, or participated in its deliberations, and, during all of that time, the sovereign State of Kansas has been deprived of that representation in the Senate of the United States guaranteed to it by the Constitution.

"The Senate of the United States shall be composed of two Senators from each State." (Sec. 3, Art. 1, Constitution.)

And this constitutional guaranty is exemplified and emphasized by the concluding sentence of Article 5, Constitution, which provides that:

"No State, without its consent, shall be deprived of its equal suffrage in the Senate."

The State has no power to recall its accredited representative. He was chosen by the Legislature of Kansas for six years, under the constitutional compact that the Senate was the sole judge of "qualifications of its *own* members," and might expel him, "with the concurrence of two-thirds."

This is an express limitation upon the power of the Senate to deprive a sovereign State of the service of its Senator, chosen as prescribed by the Constitution.

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." (Art. 10, Amendts.)

Therefore, the State has the constitutional right to be represented in the Senate by its chosen representative, possessing the qualifications prescribed by the Constitution, until the Senate, exercising its constitutional power, shall adjudge him disqualified, or, with the "concurrence of two-thirds," expel him.

Considering the hostility to the Constitution preceding its ratification by the States, and the apprehension of vesting too much power in the Congress, it is doubtful whether it would have been ratified by the States, if it had been supposed that "each House" might, by concurrence of each, surrender its constitutional prerogative to judge of the "qualifications of its own members," and, "with the concurrence of two-thirds," expel a member, or, by legislation, superadd qualifications and disqualifications to which the States had not assented, by the express terms of the Constitution, or could, by legislation, directly or indirectly, deprive a State of representation in the Senate, in any other manner or by any other mode than as expressly specified in the Constitution.

The condition now existing relative to Senator Burton is a persuasive, if not a controlling argument, that the act of 1864 is unconstitutional. The Senator from Kansas can discharge no official duty, except under the shadow of a crime. The Senate has not acted. There is no vacancy, by "resignation or otherwise," and the executive of the State has no power to appoint.

There is still another view of the act of 1864 which would seem to be an unanswerable reason to sustain the contention that it is unconstitutional. It did not require the concurrence of two-thirds of either or both Houses to pass it. It might become a law with the consent of a bare majority of each House.

While the act does not in terms provide for forfeiture of office, or expulsion, it requires a judgment, upon conviction, that the person convicted shall be "rendered forever hereafter incapable of holding any office of honor, profit or trust under *the government* of the United States." The effect of the judgment, *if the act is valid*, is to expel the Senator from the Senate.

Lowe *vs.* Com., 3 Metc. (Ky.), 241.

In his work on the Constitution of the United States, Vol. 1, p. 429, Mr. John Randolph Tucker, speaking of that

clause of the Constitution conferring power on "each House, * * * with the concurrence of two-thirds, expel a member," etc., says:

"This clause is essential to support the autonomy of each House. * * * These powers are similar to those of the two Houses of the British Parliament."

The cases cited, "as well as the reason of the provision, would justify the expulsion of a member from the House where his treasonable and criminal misconduct would show his unfitness for the public trust, and duty of a member of either House. *But expulsion, which is an extreme punishment, denying to his constituency the right to be represented by him, can only be inflicted by the concurrence of two-thirds of the House, and not by a bare majority.*"

"This authority to expel had existed in the House of Commons, * * * and was extended to all cases where the offense clearly unfitted a member for parliamentary duties."

Mr. Blackstone says: (Cooley's Blackstone Com., Vol. 1, p. 163.)

"It will be sufficient to observe that the whole law and custom of Parliament has its original from this one maxim, that 'whatever matter arises concerning either House of Parliament, ought to be examined, discussed and adjudged in that House to which it relates, and not elsewhere.' Hence, for instance, the Lords will not suffer the Commons to interfere in settling the election of a peer of Scotland; and the Commons will not allow the Lords to judge of the election of a burgess; *nor will either House permit the subordinate courts of law to examine the merits of either case.*"

By the act of 1864 Congress accomplishes a result which the Senate may only do "with the concurrence of two-thirds;" and by an act which is "not consistent with the letter and spirit of the Constitution."

Von Holst, in his work on Constitutional Law of the United States, page 102,—speaking of the clause of the Con-

stitution which authorizes the expulsion of a member of "each House," with "the concurrence of two-thirds," says:

"Both Houses of Congress must have been granted every power needed to guard themselves and their members against any impropriety on the part of a member, and to preserve their dignity and reputation among the people. *It is wholly for them to say what conduct they are to regard as dishonorable enough to require expulsion.* An appeal from their decision lies only to the court of public opinion,—a court which brings in its verdict at the elections."

One of the strongest arguments made against the impeachment of Mr. Blount was based upon the theory that it was never the intention of the framers of the Constitution to invest in the House any power or authority to in any manner, directly or indirectly, question the conduct or motives of a Senator, and hence, when the Constitution provided that the House "shall have the sole power of impeachment" it was a negation of the idea that the House could prescribe any rule of action for the Senator, because the manifest intention was to maintain absolute independence of "each House" over its "*own* members," by providing so explicitly that "each House" should be the judge "of the qualifications of its *own* members," and that "*each* House," "with the concurrence of two-thirds," might expel a member.

The act of 1864 defines a political offense. It is not an attempt to control the conduct of the citizen, but that of the Senator.

It is said in Story on Constitution (Sec. 797) that:

"There are many offenses purely political which have been held to be within the reach of parliamentary impeachment,—not one of which is in the slightest manner alluded to in our statute book. And, indeed, political offenses are of so various and complex a character,—so utterly incapable of being defined or classified,—that the task of positive legislation would be impracticable, if it were not almost absurd to attempt it."

In the enforcement of this law against Senator Burton it is impossible to separate Burton the man from Burton the Senator. The act is aimed at the Senator, and not at the man. The statute is only applicable to him because of the fact that he is a Senator. He is sought to be made amenable to the law because he did that which he was prohibited from doing, "after his election, and during his continuance in office" as United States Senator. In order to convict under the statute, the Government must allege and prove that the act complained of was done after the accused had been elected Senator, and "during his continuance in office." The accusation is against the Senator. Impeachment, under the Constitution, is a presentment or indictment on the part of the House, against "the officer," and not the man, for it is provided that the "judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy an office of honor, trust or profit under the United States." The impeachability of a member of either House (says Mr. Tucker), "therefore is by the House of which he is a member," by virtue *alone* of the power of "*each* House," "with the concurrence of two-thirds," to expel a member. "This power (1 Tucker, 418) in '*each* House' is not only sufficient in the case of such a member, but is totally inconsistent with his amenability to *this* constitutional process of impeachment. If he be a Senator, and be impeachable, the House of Representatives must impeach him by *a majority* of its members, and the Senate by a two-thirds vote convict him, which it might do under the expelling power, without the accusation of the House. But if he be a representative, the House, by a bare majority, may impeach him when two-thirds of that House are essential to expel him, and then the other body, by a two-thirds vote, is to expel a representative from the House, upon an accusation by a bare majority of that House. * * * *This seems to be too absurd to have been within the purview of the framers of the Constitution.*"

In 1 Foster on Constitution, page 572, it is said that:

"The practical construction and the better opinion since has been that neither a Senator nor a member of the House of Representatives can be impeached. *The only remedy for the misconduct of a member of either house of Congress, during his term of office,* is expulsion by his colleagues. This construction seems clear from the letter as well as the spirit of the Constitution. * * * For the removal of an unworthy Senator or Representative, the power of expulsion was conferred upon their respective Houses. *It was not intended to allow either House to regulate the membership of the other.*"

As was so well said in the trial of Senator Blount:

"Is it to be tolerated—can two branches of a legislative body dwell together under the Constitution in peace if one of them has the *constitutional* prerogative to lay its hand upon a member of the other, and force that body to which he belongs to put him on trial for an abuse of that very legislative office to which he was elected?"

Neither Congress, nor even the Parliament of Great Britain, is omnipotent, and in the United States, where written Constitutions are so highly prized, and have been invariably regarded as the limit beyond which legislative power could not extend, no legislative enactment can be permitted to override their solemn mandates. If Congress is at liberty to avoid the behests of the Constitution by such a law as the act of 1864, it would become supreme, and its exposition of that instrument would be final and conclusive.

"The genius and policy of our political institutions, rest upon principles which are at war with the doctrine of legislative omnipotence. Our government is founded upon an express written compact, reduced to exactitude and certainty, expressive of the sovereign will of the people, fixing the limit and marking the bounds of legislative authority and power. The Legislature, instead of being omnipotent, must

yield to its force, submit to its restraint, and bow to its authority. This written compact originated in a spirit of distrust of legislative authority, and from a conviction that legislative omnipotence was but another name for despotism. The evidence of that will rests not in the volition or judgment of those intended to be restricted by its own omnipotent fiat.

Under our form of government, the Legislature is a creature of the Constitution. It owes its existence to that instrument. It derives its power from it, that is, the voice of the people in their original and unlimited capacity, fixing the limits of legislative power. It is the mandate of the creator, directed to and obligatory upon the creature. Its authority is alone sovereign, absolute and supreme.

If the creature of the Constitution can pass judgment upon its obligations, and its judicial determination of its powers be clothed with the attributes of a judicial exposition, authoritative and of controlling force, then legislative omnipotence in this country would exceed that of the British Parliament, to an extent at least commensurate with the force of a written constitutional restriction, which it weighs down by the force of its judicial expositions. While the energies of Parliament are only directed to the exercise of powers unlimited and uncontrolled, legislative power in this country would go further. It would break the fetters the Constitution has wrought out, throw off the restraint it has sought to impose, and annihilate the written will of the people. Parliament never carried its arrogance to such extent. It never, except in days of revolution, nullified the written will of the people it represented, by the force of parliamentary exposition. It never trod under foot a written compact. It never sat in judgment in its own cause, and demanded for its decision in such case respect paramount to Magna Charta."

In conclusion, we bespeak the indulgence of this Court for a few brief suggestions relative to the importance of your

decision. Not only to Senator Burton as an individual—not only to the State of Kansas, whose accredited agent in the Senate of the United States he is—not only to the people of every other State in this Union, each having like representation—not only to the Chief Executive of this great nation—not only the authority and integrity of this Court,—but the whole framework of our government, founded upon the Constitution given us for our guidance by the people of all the States, and the integrity and perpetuity of the Senate of the United States, is menaced if the act of 1864 shall be held to be constitutional.

By the indictment, trial and conviction of Senator Burton, he has been politically destroyed. His hopes, aspirations and honors forever eclipsed, and, whether the law involved in this controversy be held constitutional or otherwise,—if our contention in the other brief filed herein, to which this is supplemental, be true,—he can in no wise wipe from his political escutcheon the fearful scar, or remove from the records of his life the foul blot occasioned thereby. But the wrong inflicted upon him in this matter is in a very large measure personal to himself and the people of the sovereign State who honored him with his great office. His shame and their disgrace can never be fully washed away by any decision of this Court made upon the questions involved in this brief. But the integrity of the Senate, whose sole prerogatives have been usurped by his undoing and their shame, can never again be questioned as to other Senators and other States, if our contention that this law is unconstitutional shall be affirmed by this Court.

Prior to the war of the rebellion the tendency of this Court to hold all departments of the government,—the executive, the judicial and the legislative,—to a strict accountability to the limitations of the Constitution is conceded. But is it not a fact that, in later years, we have been aimlessly drifting from the ancient landmarks so firmly fixed for our guidance and happiness? With a return to our sober second thought, vitalized by the consciousness of grave dangers im-

ment by reason of usurpations and aggressions upon the letter and spirit of the great Charter, should we not be admonished, before it is too late, to place our house in order, as it were, to the end that we may weather the storm that is surely coming? The intelligence, integrity and judicial ability of this Court, present and future, alone must save us, else we will go as all other governments have which had no constitutional restrictions, or, having them, allowed themselves to drift therefrom.

It is doubted if this Court was ever called upon, or ever will be, to pass upon a question of such magnitude, and far-reaching in consequences as this. The integrity and perpetuity of our form of government is menaced, if it shall be held that a jury of twelve men, upon purely a political question such as this, can create a vacancy in the United States Senate. If so, may not Congress in the same way create a vacancy in the Presidency or in this Court? *If the executive power of the government, acting through this law, can invade the Senate of the United States*, and, by and through the instrumentality of a jury, remove a Senator, why may not a like law be passed affecting the members of this Court, and invoked, as in this case, without evidence, and one or all of the members of this Court, at the dictation of one of the Congressional courts inferior to this Court, through like instrumentality, removed from office?

If this law be not a gross violation of the Constitution of this nation, what is to hinder the Congress from passing a like law as to the President, and then, in a prosecution commenced by the political party controlling such Congress, and adverse to such executive, by and through a like jury, remove him from his office?

It is provided by the Constitution that the President shall, "from time to time, give to Congress information of the State of the Union, and recommend to their consideration such measures as he shall adjudge necessary and expedient."

It is no part of the constitutional duty of the President to

do more with reference to measures pending before Congress. It was evidently the intention of the framers of the Constitution that the executive should not trench upon the independence of the legislative department of the Government; that the executive should bring to bear no insidious influence to control the action of any member of Congress on any measure pending before it.

Suppose that Congress, feeling that the executive was becoming too aggressive,—was encroaching upon the independence of the legislative branch of the Government,—should make a law that: "It shall be unlawful for any President, after his election, and during his continuance in office, to directly or indirectly attempt to influence the vote of any member of Congress for or against any measure pending before it;" and that: "It shall be unlawful for any President, after his election, and during his continuance in office, to offer or promise to any Senator the control of any public patronage, as an inducement for his vote for the ratification of any treaty, or the confirmation of the appointment of any officer by the President. That any person violating the provisions of this act shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine not exceeding $10,000, or imprisonment not exceeding two years, and, upon such conviction, rendered forever thereafter incapable of holding any office of honor, trust or profit under the Government of the United States."

Would such a law be constitutional? Could it be claimed, with any degree of reason, that it was ever the intention of the framers of the Constitution that Congress could thus place limitations and restrictions upon the acts of the President of the United States, and subject him to a prosecution for a violation thereof before an inferior judicial tribunal of the country, and, upon his conviction, fined and imprisoned in a county jail, and thereafter forever disqualified from holding any office of honor, profit or trust under the Government of the United States?

If such a law would not be constitutional and enforcible as against the President, then clearly the act of 1864 is not valid and enforcible as against a Senator,—because the same reasons which may be urged against the law affecting the President are equally applicable against the law affecting the Senator. The Constitution provides the tribunal before which the President may be tried and removed from office; and it provides no less specifically the tribunal which may punish and expel a Senator for dereliction of an official duty. The President may be impeached and removed from office for high crimes and misdemeanors, without being guilty of the violation of any criminal statute, in the same manner as Senator Blount was expelled for high crimes and misdemeanors, when it was conceded that he had not violated any statute of the United States, or of any sovereign State.

Andrew Johnson could thus have been removed from office, without the concurrence of two-thirds of the Senators voting,—for want of which he was not removed, and which is required to remove or expel a Senator. In other words, if our contention be fallacious, then is there any obstacle in the way of those occupying such positions from being destroyed, as Burton has been, if Congress shall elect to lay the groundwork therefor by like legislation? And if so, where is it to end, and what is to become of the constitutional guarantees vouchsafed in that instrument, which in the very nature of such ravishments of its provisions, destroys in time the government handed down to us by our fathers?

These are not wild speculations, but are legitimate, irresistible evidential facts, pointing the way in no doubtful language of "where we are, and whither we are drifting." The appalling consequences of the upholding of such a law, and the declarations by this court of its constitutionality, now invite the terrible possibilities that a mistake in this case at this time by this court, because every infringement of the provisions of that instrument acquiesced in by this court, if such action on the part of this court is even possible, encourages like violations thereof. And the end is not yet.

If the Constitution can thus be indirectly violated, instead of its "remaining firm and immovable as a mountain amid the strife of storms, or a rock in the ocean amid the raging of the waves," it becomes a frail bark which may be rocked by the surges of political strife, be tossed and shattered by every breeze which ambition or avarice may excite, and will become a total wreck whenever it shall have encountered three or four successful mutilations upon the quicksands of legislative precedent.

Respectfully submitted,

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## Reply to the Brief of the Government on the Question of the Constitutionality of Section 1782.

It is stated in the brief of the Government (page 59) that "section 1782 applies to individuals. *It is aimed at all persons holding positions of trust or confidence in the service of the* United States." The attempt is made to show that section 1782 places no restrictions upon the "official conduct" of a Senator. It is charged in the indictment (Record, page 5) that the defendant, "*by the influence of his presence and of his office as such Senator*," &c., did do certain acts complained of, and this is the basis of the accusation against Burton. It is a charge against him of *official misconduct* as Senator, and in the consideration of this question it is impossible to separate Burton the man from Burton the Senator. The delegation of power to punish a Senator for official misconduct fixes the tribunal before which he shall be tried, to wit, the Senate. If the act charged against Burton is *not* "official misconduct," his conviction under section 1782 is without warrant. If the act charged *is* "official misconduct," then Congress had no constitutional power to delegate to the judiciary the right to try him for such misconduct, for, as stated, the Senate was the tribunal fixed by the Constitution and there is no express or implied authority in Congress to delegate such power to any other tribunal. The compact in the Constitution between the States and the Federal Government was that the Senator for "official misconduct" could be punished in no other way or by any other tribunal than as prescribed by the Constitution. The President could certainly be tried for "official misconduct" in no other manner and by no other tribunal than as prescribed by the Constitution.

Counsel for the Government contend that the fact that a man is Senator does not secure him immunity for crime committed in violation of a statute. This we concede. The

right of *the States* to punish for violation of the statute was not surrendered to the United States, but was expressly reserved to the States. When the power was conferred—"*each* House may determine the rules of its proceedings, punish its members for disorderly behavior, and with the concurrence of two-thirds expel a member"—it was upon the condition that "*no State, without its consent, shall be deprived of its equal suffrage in the Senate.*"

If not an *express* prohibition, it is clearly implied that Congress could not lawfully by statute fix a standard of "official conduct," and for a violation of such standard delegate to the judiciary the power to lock the Senator behind prison bars for two years, and "without its consent" deprive a sovereign State "of its equal suffrage in the Senate."

Counsel for the Government admit and concede (Brief, 58) that:

"*With the performance of their constitutional duties as Senators no act of Congress could properly interfere.*"

We respectfully ask, How will it be possible for Senator Burton to perform his constitutional duties while locked up in the county jail at Ironton, Missouri? Counsel say (Brief, p. 62):

"If Congress had intended that the effect of conviction of violating section 1782 should be to unseat a Senator or Representative, it would have said so. * * * *Properly read, the statute leaves the status of a convicted Senator as a member of the Senate to the determination of that body. They may or may not expel him, as they see fit.*"

How would this operate? Senator Burton was convicted on six counts. Under the section 1782 he could have been sentenced for twelve years' imprisonment. Counsel seriously contends that such a sentence would not interfere with him in the discharge of his constitutional duties as Senator, and that his status as Senator was not changed; that the Senate "*may or may not expel him, as they see fit.*" If this conten-

tion is sound, then the State of Kansas, being unable to recall the Senator and there being no vacancy, is absolutely powerless to secure "its equal suffrage in the Senate" during all the time Senator Burton is in prison for a violation of section 1782. The situation is exemplified and emphasized by the motion of learned counsel for the Government to advance this cause, which is as follows, viz:

IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1905.

JOSEPH RALPH BURTON, *Plaintiff in Error*,
*v.*
THE UNITED STATES. } No. 539.

**Motion to Advance.**

The Solicitor General on behalf of the United States respectfully moves the court to advance the above-entitled cause on the docket for early hearing.

The plaintiff in error, the defendant below, was originally indicted on the 23d day of January, 1904, for violating section 1782 of the Revised Statutes of the United States. His trial and conviction followed in March, 1904, and the case was brought to this court by writ of error. Upon motion of the plaintiff in error the hearing of the cause was advanced. On January 16, 1905, this court reversed the judgment of the District court and remanded the cause, with direction to grant a new trial.

The plaintiff in error was reindicted for violating said section 1782, Revised Statutes, and his second trial and conviction followed in November, 1905.

He was elected United States Senator for the State of Kansas for a term of six years, expiring on the 4th day of March, 1907. He has not resigned, neither has he participated in the deliberations of the Senate since his original indictment on January 23, 1904.

**It will thus be seen that the State of Kansas has been without its full representation in the Senate for a period of nearly two years. Under the provisions of the statute, if the judgment of the court below is sustained, the office of plaintiff in error is ipso facto vacated. It is therefore of great importance to the people of the State of Kansas, that this case be determined at an early date. The interests of the General Government will also be subserved by an early hearing.**

HENRY M. HOYT,
*Solicitor General.*

This admission of the counsel for the Government in this motion is hardly consistent with the contention in his brief, that the Senate "may or may not expel him, as they see fit."

But counsel say (Brief, 59), referring to section 1782:

"It does not interfere with the authority of the Senate over its members, because the position of Senator can not be construed to be an office under the Government of the United States within the meaning of that section."

This Government is a constitutional Government. It was created by the Constitution with three co-ordinate branches. Abolish the Senate and we have no constitutional Government. The Senator is an integral part of the Senate. The President is not a "civil officer" of the Government, in the sense of the Constitution providing for his impeachment; however it is provided that "the President, Vice-president, and all *civil officers* of the United States shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors," and it is in this sense that Judge Story states that the Senate in the Blount case reached the conclusion that a Senator was not

a "civil officer" of the United States, in a sense that he might be impeached, but as a substitute for impeachment the right to punish or expel "its *own* members" was expressly conferred upon "each House."

Speaking of the judgment of the court below disqualifying the defendant from holding any office, &c., counsel for the Government (Brief, 62) says:

> "It was surplusage for the court to include this declaration of the statute in its sentence. *The disqualification referred to attaches by virtue of the law itself upon conviction.*"

While the Senate is given exclusive power to judge of the qualifications of "its *own* members," and it will be conceded that the Senate could not, by any rule, in expelling a member affix such a disqualification, it is gravely contended that Congress may constitutionally attach such a disqualification to the "official misconduct" of a Senator, which could in no way operate to affect the status of the convicted Senator before the Senate which "may or may not expel him, as they see fit."

It seems, therefore, to be conceded by counsel for the Government that the *effect* of the conviction is to operate as a disqualification for ever "hereafter to hold any office of honor, profit or trust under the Government of the United States," but that in *any* event the status of the convicted Senator, *as Senator*, is not changed. Can such be the law?

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# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

## No. 539.

JOSEPH RALPH BURTON, PLAINTIFF IN ERROR,

*vs.*

THE UNITED STATES.

IN ERROR TO CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

## Supplemental Brief on Question of Constitutionality of Section 1782, Revised Statutes.

### A.

If, as we maintain, the power to discipline a Senator for misconduct as a Senator, in which misconduct a necessary element is that he is a Senator, rests exclusively with the Senate itself under the provisions of the Constitution, then the entire section 1782 is invalid as to Senators (and Representatives also), and no question arises of separability of the invalid clause of section 1782 that undertakes to incapacitate any person (Senator included) from holding office after conviction.

B.

But even if (as we deny) such official misconduct of a Senator may be made an offense by act of Congress and made triable and punishable by the courts, then the invalid clause, which undertakes to incapacitate a Senator from holding office after conviction, is not separable, and the entire section 1782 is equally invalid as to Senators.

## A Senator is an officer under the Government of the United States.

*Abolish* the "Government of the United States," then the Senate is abolished, and the office of Senator. The Government of the United States consists of Legislative, Executive, and Judicial Departments. The Senate is part of the Government, created by the Constitution, and a Senator is an officer under such Government.

Consider the *mischief* aimed at in section 1782, namely, a Senator or Representative abusing his high office, and the *remedy* provided in section 1782 is that he is removed from office. A reading of the statute, section 1782, leads inevitably to this conclusion.

We are not concerned with any abstract question as to what is an *"officer of the United States;"* but what does this particular statute mean? This reads: That any Senator who while *"in office"* does certain things shall be incapacitated from holding *any* "office."

The suggestion of the prosecution is that this means not the office which he has abused, but some other office, and that the Senator keeps right on in the office which he has abused.

**Mr. Justice Brown suggested whether part of section 1782 as to being incapacitated, by conviction, from holding office could be held invalid and the rest of the statute stand.**

Is that part of the statute separable? Test this question. The well-established rule is that it must be *clear* that the legislative body would have enacted the statute with the invalid part left out.

*The mischief* aimed at by statute was abuse by Senators and Representatives of their high office—misconduct while in office. The suggestion that this invalid clause is separable is that the legislative body would have passed this act, though it left the Senator who had abused his office still in office, instead of removing him from it as a punishment for his misconduct; also that the legislative body would have enacted that the Senator might be imprisoned for two years, and thus be kept out of the Senate, and yet no vacancy created which might be filled, and then he be received back into the Senate when his term of imprisonment ended, and then go on with senatorial duties as though he had not abused his high office.

In order to hold the invalid clause separable this court must say not merely that the legislative body *might* have enacted such an improbable and absurd statute, but that *it is clear* that the legislative body would have enacted it.

The suggestion has been made also that the Senate might try a Senator after the courts had finished their trial.

Try him when?

(1.) While he is in prison and in his absence and without giving him an opportunity to be heard?

(2.) Or bring him out of prison to be tried?

(3.) Or try him at the end of the imprisonment—after his seat has remained unoccupied two years or four years or more, as the case may be?

Is it CLEAR that Congress would have enacted such an absurd statute?

On the contrary, it is clear that Congress would not.

The invalid clause is not separable.

B. P. WAGGENER,
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[redacted]

# In the Supreme Court of the United States.

OCTOBER TERM, 1905.

JOSEPH RALPH BURTON, PLAINTIFF IN ERROR,
*vs.*
THE UNITED STATES, DEFENDANT IN ERROR.
No. 539

## PETITION OF PLAINTIFF IN ERROR FOR A REHEARING OF THE CASE.

Comes now Joseph Ralph Burton, plaintiff in error herein, and pursuant to leave of Court heretofore obtained, prays the Court for a rehearing of the above entitled cause, and as grounds of such petition states :

I.

The Court should have sustained the contention of plaintiff in error that section 1782,— the statute under which he was prosecuted,— was unconstitutional and void, and, in the consideration of the question, as disclosed by the opinion filed, would seem to have overlooked many important considerations relative to the validity of said statute.

II.

The Court did not consider and failed to pass upon important questions presented by the appeal and vitally affecting the question of the guilt or innocence of the plaintiff in error, viz:

**1. There was a fatal variance between the indictment and the evidence, and there was no proof to sustain the charge of the indictment as to the services rendered by the defendant Burton.**

The services are described alike in the sixth and seventh counts of the indictment as

"Consisting of his, the said Joseph Ralph Burton's appearing before the Post Office Department, and before the said Postmaster General, the Chief Post Office Inspector, and the Assistant Attorney General for said Post Office Department, and other officers of said Post Office Department, as an agent of and attorney for the said corporation, and obtaining information for said corporation concerning said proceeding in this count mentioned, in which the United States was then indirectly interested, *and by the influence of his presence and of his office as such Senator, and by statements, representations and persuasion inducing the said Postmaster General to believe that the said corporation was not conducting any such scheme to defraud as that last above mentioned, and to put a stop to any further investigation of the questions in this count mentioned by the said Post Office Department and by the said Postmaster General and to refrain from determining the same adversely to the interests of the said corporation,* etc., etc." (Rec. p. 13).

Here are two distinct charges, the one, of appearing before several different officers to obtain information, and

the other, of appearing before the Postmaster General, and only before him, and by the influence of personal presence, and by statements, representations and persuasions, inducing the Postmaster General to believe, etc.

The charge as to obtaining information shows no violation of the statute, nor was it submitted to the jury, so that in no event can that sustain the verdict or the judgment.

The sole issue presented by the indictment and submitted to the jury was that made by the charge that the defendant agreed to appear and did appear before the Postmaster General and induce him to believe, etc.

This charge and the issue presented thereby, was definite and specific, and must be sustained by the evidence, or the indictment must fail.

The only evidence involving the Postmaster General was that as to a transaction of January 24th, 1903, when the defendant called on Chief Inspector Cochran, and the two called on Assistant Postmaster General Bristow, and possibly the three, but in all probability only Cochran and Bristow, called on the Postmaster General.

But the transaction of this day confessedly had no relation to the business of the Rialto Company, and related exclusively to the recovery of the books of the Brooks Brokerage Company.

There was then an absolute failure of proof to support the only charge of the indictment as to services rendered by defendant for the Rialto Company.

If anything else shown to have been done by defendant constituted service to the Rialto Company, it was not the service described in the indictment, and so there was a fatal variance between the indictment and the evidence.

The question thus presented is not as to the sufficiency of the indictment, but is as to the support of the charge by the testimony.

The Court below therefore erred in not sustaining the motions to direct a verdict, made at the close of the Govment's case, and again at the close of the entire case, and also in its charge to the jury that as to this phase of the case the defendant was guilty, not if he rendered the specific service described in the indictment, but if he rendered any service before any officer of the Post Office Department. (Rec. p. 260).

**2. The twelfth instruction asked by us should have been given.**

It was:

"If the jury find from the evidence that the defendant was employed by the Rialto Grain and Securities Company by the month, at a salary of five hundred dollars per month, for a period of not less than five months, and that for the month covered by the payment of March 26th, 1903, he rendered no services in the Postal Department in any proceeding there pending looking to the issuance of a fraud order against the Company, then they should find the defendant not guilty on the third and seventh counts." (Rec. p. 267).

The testimony certainly warranted a finding by the jury that the employment was by the month. In any

event that was a matter for the jury to determine. And there was no testimony that any service was rendered after March 15th, 1903.

The employment of defendant by the Rialto Company was an employment to serve generally as counsel ; it was for service by the month, and for payment by the month. It begun in November, 1902, and ended in March, 1903.

If, in November, 1902, the defendant rendered service of the kind inhibited by the statute, and received compensation therefor in his November salary, he then and thereby incurred the penalty of the law, and was and is subject to prosecution and punishment in the proper jurisdiction.

But if never again the defendant rendered services of the kind inhibited, if everything done by him in December, January, February and March, and for which he was paid, was something which he might lawfully have done and accepted pay for, and this was for the jury to determine, the instruction asked should have been given, otherwise, for one act, from its nature constituting but one wrong, the defendant would be subjected to repeated punishments.

The offense charged in the seventh count has two incidents included in it, and they must co-exist or there is no offense, viz : rendering certain service and receiving compensation therefor. One of these is as essential as the other. There is no crime if either does not exist.

To yoke up the same identical incident of service with

the successive monthly payments, and make a separate offense of each month's receipt of payment, what is this but putting the defendant repeatedly in jeopardy for the same act ?

If only in one month the defendant rendered inhibited services, then only as to that month did the two incidents essential to constitute the offense co-exist, and for that month's transaction, and only for that month's transaction, was he subject to prosecution.

This principle involved, and which was violated by the refusal of our instruction, was declared in the case of Hans Nielsen, 131 U. S., 188, where the Court said :

"It seems to us very clear, that where, as in this case, a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of these incidents without being twice put in jeopardy for the same offense."

**3. The various letters of complaint sent to the department by Houts, Evans, Allen, Warner and Fravel, and the accompanying circulars and booklets of the Rialto Company, should not have been read to the jury.**

They were not needed to prove the pendency of a proceeding in the Department. Their sole effect was to disparage the Rialto Grain and Securities Company, and therefore to create prejudice against any man connected with the Company in any manner whatsoever.

The character of the Rialto Company and its business

was not involved in the case, and was held to be an immaterial issue. It was not open to defendant to rebut any presumptions arising from this testimony. He would not have been permitted to show that the letters were untrue, or that the circulars and booklets were never sent out by the Rialto Company, if such had been the fact.

There was no necessity for receiving any of this evidence, and there can be no justification for receiving this great mass of it. The evil effect of it was not and could not be prevented by the mere statement of the Court (Rec. p. 49) that it was admitted only to show the pendency of a proceeding and not to establish the truth of the matters recited.

Once in the case, it was used for every purpose, and, while wholly immaterial and irrelevant as to the vital issues of fact, and therefore incapable of proving anything, it is beyond question that with this mass of stuff out of the case, conviction would be impossible. It was admitted into the case as for one purpose only, but being in, was used for an entirely different purpose.

Taken in connection with the exclusion of evidence offered by defendant, to which we next call attention, there was a gross and grievous injustice done defendant.

**4. The report of Inspectors Price and Piatt and the order or recommendation of Assistant Attorney General Robb in the proceeding against the Rialto Company should have been received in evidence.** (Rec. pp. 216-226).

This, with what the Government offered and the Court admitted, made up the whole record of that proceeding.

The case of the Government against this defendant rested largely on inference, strained to a degree, and was predicated in large measure upon the fact that no fraud order was ever issued, and upon the assumption that such an order should have been issued. The argument was that a fraud order should have been issued, the defendant was about the Department while the matter was pending, no fraud order was issued, and therefore it is to be presumed that the defendant prevented its issuance.

Under these circumstances, we should have been permitted to complete the record of this proceeding. The letters of Houts and others, the circulars and booklets, were relied upon by the Government to show that a fraud order should have been issued, and that it did not in fact issue, was imputed to the interference of the defendant.

We desired to complete the record, and offered the report of Inspectors Price and Piatt and the order or recommendation of Assistant Attorney General Robb, which showed conclusively why no fraud order was issued, and that no interference by defendant was accountable therefor, but that law officers of the Government, not influenced by defendant in any way, never seen or spoken or written to by him, had advised that the case did not warrant a fraud order. We respectfully request consideration of the tenth head of our brief and argument in this connection.

*Everything in the record of the "proceeding" before the Department, however irrelevant to the charge against the defendant, was admitted in evidence against him, and furnished the occasion for adverse argument and inference. Everything in the record of the "proceeding" favorable to him, everything which would refute the adverse argument and rebut the adverse inference was excluded.*

**5. The evidence of Hubner** (Rec. 183-184) **should have been excluded.**

It was simply to the effect that defendant had an interview with Assistant Attorney General Tyner on December 1st, 1902.

The "proceeding" was not then and never was pending before that official. He never did anything with respect to it. There was no evidence that he had ever heard of it. There was no evidence that defendant said a word to him concerning it.

It was shown simply that in the routine course of business in the Department, this official, when a case was made up by the inspectors on the facts, examined it and made recommendation to the Postmaster General for or against the issuance of a fraud order.

The defendant could recall no such interview. But grant that there was one, can it be, under the circumstances, the basis of an inference that its purpose was an evil one, and the specific evil purpose charged in the indictment ?

General Tyner was not impeached by this record in

any way. He was, so far as here appears, and so far as we know, a man of fair fame and good name in December, 1902. The evidence of this interview, offered by the Government, objected to by us but nevertheless admitted by the Court, was used by the Government to supplement every lack of definite proof in the case.

Nothing was shown to have been done having any tendency to prevent the issuance of a fraud order in any of the interviews with Cochran, and so this interview with Tyner, dead when this case was tried and dead when first the interview was suggested as having taken place, was relied upon, and it was not possible for defendant to refute the awful imaginings of what occurred therein.

**6. Against the objection of defendant, Inspector Cochran was permitted to testify** (Rec. pp. 159 and 160) **that when in November, 1902, the defendant asked him whether any complaints had been received against the Rialto Company, he answered him as he would have answered any one else that a case had been made up, but that he gave him the names of the complainants "because he was a Senator of the United States."**

There is no pretense that the defendant urged his office as Senator as a reason for obtaining information which would have been denied to a private citizen.

There is no evidence in the record of any rule or usage of the Department, known to the defendant or un-

known to him, entitling a Senator to information which would be denied to any one else.

And there is not, and there cannot be, any reason for any such discrimination as that suggested.

A Senator has and can have no right to any information of the kind here involved, beyond any other citizen of the United States.

The inquiry elicited and the answer disclosed no *fact* which could bear on the guilt or innocence of the defendant. It revealed simply a state of mind on the part of the witness not made known to the defendant until the time of his trial.

But it was a grave reproach upon the defendant by the witness, and it was one the defendant could not repel. He could not say what was or was not the inner motive of the witness in giving him the information he did.

It was the legitimate function of the witness to state what occurred in the interview, and no more. It was not for the witness to characterize what was done or said as being good or evil. The facts must bear their own import.

But here the witness was permitted not simply to bear witness, but to make accusation against the defendant. And this, too, in a case which had been pronounced by four judges of this tribunal to be without foundation.

It was by the accumulation of matters like this, the secret thought of the witness, the unlimited because unproved possibilities of an interview with a man dead at

the time of trial the testimony not of what the defendant and the Rialto Company had done, testimony that was relevant to no real issue in the case, and yet was made to meet every emergency, that the defendant's conviction was accomplished. And the questions raised in connection with these matters are of the greatest importance in this case. They bear upon the issue of guilt or innocence, and this to the defendant means more than any legal or Constitutional question, and indeed that this issue of guilt or innocence may in every case, as far as human imperfections permit, be rightfully determined, is after all the paramount purpose of all our Laws and all our Constitutions.

III.

The matters hereinbefore suggested by the Court were not passed upon in the opinion. We pray also for a rehearing upon the first, third, fourth, fifth and seventh points made in our main brief, and also upon that made in our supplemental brief.

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The undersigned, attorneys for Joseph Ralph Burton,

do hereby certify that the above and foregoing application for a re-hearing is made in good faith, and not for delay, and that, in the opinion of counsel, it is well grounded in law and in fact.

John F. Dillon
F. W. Lehmann
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# In the Supreme Court of the United States.

OCTOBER TERM, 1905.

JOSEPH RALPH BURTON, PLAINTIFF IN ERROR,
*v.*
THE UNITED STATES. } No. 539.

*IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.*

## BRIEF FOR THE UNITED STATES.

### STATEMENT.

Pursuant to the opinion and judgment of this court upon the former appeal (*Burton* v. *United States*, 196 U. S. 283), Burton was retried, upon a new indictment, at the September term, 1905, of the Circuit Court for the Eastern District of Missouri, Judge Van Devanter presiding.

The indictment (R., 3–16), in eight counts, charged in substance two offenses, under section 1782 of the Revised Statutes:

1. That Burton, while a Senator of the United States, agreed with the Rialto Grain and Securities

Company, at St. Louis, to receive certain compensation ($2,500) for services to be rendered by him in relation to a certain proceeding, matter, or thing before the Post-Office Department in which the United States was interested.

2. That, while a Senator of the United States, he received compensation ($500) for certain services rendered by him in relation to such proceeding.

The proceeding referred to was described as "a proceeding for determining whether said corporation had been and was engaged in conducting a scheme for obtaining money from persons then resident in divers parts of the United States, through the mails of the United States, by means of false and fraudulent pretenses, representations, and promises," and whether the Postmaster-General should instruct the postmaster at St. Louis to return all registered letters and other mail matter directed to said corporation to the post-offices at which mailed, to be returned to the senders with the word "Fraudulent" plainly written or stamped upon the outside thereof, and whether the Postmaster-General should forbid the payment by the postmaster at St. Louis to the said corporation of all postal money orders drawn to its order or in its favor, and require the return to the several remitters thereof of the several sums named in such money orders.

The services rendered or to be rendered were alleged to consist of "Burton's appearing before the said Post-Office Department and before the said Postmaster-General, the chief post-office inspector, and the Assist-

ant Attorney-General for said Post-Office Department, and other officers of said Post-Office Department, as an agent of and attorney for the said corporation, and obtaining information for said corporation concerning said proceeding in this count mentioned, in which the United States was then indirectly interested, and by the influence of his presence and of his office as such Senator, and by statements, representations, and persuasion, inducing the said Postmaster-General to believe that the said corporation was not conducting any such scheme to defraud as that last above mentioned, and to put a stop to any further investigation of the questions in this count mentioned by the said Post-Office Department and by the said Postmaster-General, and to refrain from determining the same adversely to the interests of the said corporation, and from instructing the said postmaster at the said post-office at St. Louis" to return the registered letters and other mail matter directed to the corporation, and from forbidding the payment to it of postal money orders. (Sixth count, R. 11, 13.)

The first, second, fourth, sixth, and eighth counts charged the agreement to receive compensation, and substantially differed only as to the interest of the United States alleged in said proceeding, whether direct or indirect, or both.

The third, fifth, and seventh counts charged the receipt of compensation differing likewise as to the nature of the interest of the United States alleged in said proceeding, whether direct or indirect.

The third, fifth, and seventh counts were based upon the cash payment of $500 to Burton at St. Louis on March 26, 1903. This court having held, on the former appeal, that the checks mailed to Burton and cashed by the Riggs National Bank in this city constituted receipt of compensation here, those checks entered into the present prosecution only as they went to make up the sum of $2,500 which he was charged by the other counts with having agreed to receive.

Defendant filed a demurrer to the indictment and to each and every count thereof. (R., 17.) The district attorney then moved that the indictment, as to the fourth and fifth counts, be dismissed (R., 19), which motion the court granted, but overruled the demurrer to the other counts. (R., 19.)

Defendant then filed a plea in bar to the third and seventh counts (which charged the receipt of compensation), on the ground that he had been acquitted of the offense charged therein at the former trial (R., 20). To this plea the United States filed a replication, or answer, afterwards substituting an amended answer (R., 23, 24), to which defendant demurred (R., 30). The court overruled this demurrer, and, the defendant declining to plead further, overruled and denied the plea in bar (R., 29).

Defendant was thereupon arraigned, and plead not guilty. A jury was impanelled and the case proceeded to trial.

The jury returned a verdict of guilty upon each of the several counts remaining in the indictment (R., 33).

Motions for new trial and in arrest of judgment were made and overruled (R., 34), and the court rendered judgment and sentenced defendant upon the verdict given upon the sixth and seventh counts of the indictment, imposing six months' imprisonment in the county jail and a fine of $2,000 for the offense covered by the sixth count, and six months' imprisonment (to run concurrently with the term imposed upon the sixth count) and a fine of $500 for the offense covered by the seventh count, and adjudging upon both counts that defendant was forever rendered incapable of holding any office of honor, trust, or profit under the Government of the United States (R., 35).

Thereupon defendant sued out this writ of error.

## THE STATUTES.

Section 1782, Revised Statutes, provides:

> No Senator, Representative, or Delegate, after his election and during his continuance in office, and no head of a Department, or other officer or clerk in the employ of the Government, shall receive or agree to receive any compensation whatever, directly or indirectly, for any services rendered, or to be rendered, to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party, or directly or indirectly interested, before any Department, court-martial, bureau, officer, or any civil, military, or naval commission whatever. Every person offending

> against this section shall be deemed guilty of a misdemeanor, and shall be imprisoned not more than two years, and fined not more than ten thousand dollars, and shall, moreover, by conviction therefor be rendered forever thereafter incapable of holding any office of honor, trust, or profit under the Government of the United States.

This statute was taken from the act of June 11, 1864, the language of which is substantially the same. The bill as originally introduced made it an offense for a Senator or Representative to act as counsel, with or without compensation, in any court, in a cause in which the United States was a party or directly or indirectly interested, or to receive compensation of any kind for services of any description rendered by himself or another in relation to such cause or proceeding. This provision was subsequently stricken out. (Cong. Globe, 38th Cong., 1st sess., pp. 555–561.)

Sections 3929 and 4041, Revised Statutes, known as the "fraud order statutes," as amended by the act of September 19, 1890 (26 Stat., 466), are as follows:

> SEC. 3929. The Postmaster-General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, repre-

sentations, or promises, instructs postmasters at any post-office at which registered letters arrive directed to any such person or company, whether such agent or representative is acting as an individual or as a firm, bank, corporation, or association of any kind, to return all such registered letters to the postmaster at the office at which they were originally mailed, with the word "Fraudulent" plainly written or stamped upon the outside thereof; and all such letters so returned to such postmasters shall be by them returned to the writers thereof, under such regulations as the Postmaster-General may prescribe. But nothing contained in this section shall be so construed as to authorize any postmaster or other person to open any letter not addressed to himself. The public advertisement by such person or company so conducting such lottery, gift enterprise, scheme, or device that remittances for the same may be made by registered letters to any other person, firm, bank, corporation, or association named therein shall be held to be prima facie evidence of the existence of said agency by all the parties named therein; but the Postmaster-General shall not be precluded from ascertaining the existence of such agency in any other legal way satisfactory to himself.

SEC. 4041. The Postmaster-General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money or of any real or personal property by lot, chance, or drawing of any

kind, or that any person or company is conducting any other scheme for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, forbid the payment by any postmaster to said person or company of any postal money orders drawn to his or its order, or in his or its favor, or to the agent of any such person or company, whether such agent is acting as an individual or as a firm, bank, corporation, or association of any kind, and may provide by regulation for the return to the remitters of the sums named in such money orders. But this shall not authorize any person to open any letter not addressed to himself. The public advertisement by such person or company so conducting any such lottery, gift enterprise, scheme, or device, that remittances for the same may be made by means of postal money orders to any other person, firm, bank, corporation, or association named therein, shall be held to be prima facie evidence of the existence of said agency by all the parties named therein; but the Postmaster-General shall not be precluded from ascertaining the existence of such agency in any other legal way.

Section 4 of the act of March 2, 1895 (28 Stat., 963) provides "that the powers conferred upon the Postmaster-General by the statute of eighteen hundred and ninety, chapter nine hundred and eight, section two, are hereby extended and made applicable to all other matter sent by mail."

## ARGUMENT.

The assignments of error are numerous, but they may be grouped under several headings.

### AS TO WHETHER THE INDICTMENT PRESENTS A CASE WITHIN THE STATUTE.

The case presented by this indictment is substantially the same as that before this court on the former appeal, which was held to be within the statute. (196 U. S., 295.)

This indictment does not set up, as a part of the alleged matter before the Post-Office Department, whether the Rialto Grain and Securities Company violated section 5480 of the Revised Statutes, which provides for the punishment of persons sending letters through the mails with intent to defraud, for the reason that the Circuit Court, in overruling an indictment framed along that line, held that the Postmaster-General had nothing to do with determining whether that section had been violated—that that was a matter for the investigation of the grand jury, and that sections 3929 and 4041 alone presented a matter for the determination of the Postmaster-General, namely, whether a fraud order should be issued. As the Circuit Court said, this point as to section 5480 was not made in respect to the former indictment and was not passed upon by the courts.

The matter alleged to have been before the Post-Office Department is denominated in the present indictment a "proceeding." In view of the practice in such case, this is clearly the proper designation.

Undoubtedly it was this fraud-order proceeding, and the services alleged to have been rendered in relation thereto, that the court had in mind when it said that the former indictment presented a case within the statute. The fact that the present indictment charges an agreement to receive compensation, as well as the receipt of compensation, does not enter into the determination of this question, as both relate to services rendered or to be rendered in relation to said fraud-order proceeding.

### THE PLEA IN BAR.

The plea in bar (R., 20) sets up that at the former trial Burton had been acquitted of the offense charged in the third count of the original indictment, and that the offense so charged was the same as the offense charged in the third and seventh counts of the present indictment.

The amended answer to this plea alleged (R., 24, 29):

> That in counts one and two of the original indictment against the said defendant, Joseph Ralph Burton, the said defendant was charged with accepting five hundred dollars ($500.00) from the *Rialto Grain and Securities Company*, a corporation, for services performed for said company by said defendant, whereas in count three of said original indictment, partially set out in said plea in bar, said defendant was charged with accepting five hundred dollars ($500.00) from one *W. D. Mahaney, an officer and employe of said Rialto Grain and Securities Company*, for

the same services mentioned in said counts one and two.

The said defendant, Joseph Ralph Burton, was duly convicted by the jury as charged in said counts one and two of said original indictment, and judgment pronounced upon said verdict.

That said defendant prosecuted an appeal from said verdict and judgment to the Supreme Court of the United States, wherein a new trial was in effect granted the said defendant.

* * * * *

And the United States further answering says that the offense charged against said defendant, Joseph Ralph Burton, in said counts three and seven of the indictment herein is identical in legal effect with the offense charged in said counts one and two of said original indictment, but that the offense charged against the defendant in said counts three and seven of the indictment herein is not identical in legal effect with said count three of said original indictment, as will appear from an examination of said counts.

To this answer defendant demurred.

Counts one and two of the original indictment were intended to cover the case of the receipt of the compensation mentioned from the Rialto Grain and Securities Company; count three, that of receipt from W. D. Mahaney personally, the words "an officer and employee of said Rialto Grain and Securities Company" being used merely for the purpose of identification.

Count 3 of the present indictment charges the receipt of the $500 from "said corporation;" count 7, from

"said corporation, through its officers, agents, and attorneys." The words "through its officers, agents, or attorneys" describe the medium or channel of payment, and in no wise alter the charge that the money was received from "said corporation." These counts are therefore identical in law with counts 1 and 2 of the original indictment, upon which Burton was convicted, which charged receipt from the company, and are not identical with count 3, upon which he was acquitted, which charged the receipt from Mahaney. The defendant would doubtless have claimed a variance if the proof had shown receipt from Mahaney personally, when the indictment alleged receipt from the company.

But even if it were otherwise—if the counts in question were precisely alike—Burton could not take advantage of the verdict of acquittal on the third count at the former trial. The effect of granting a new trial is to nullify entirely the proceedings at the former trial, as this court declared in *Trono* v. *United States*, decided December 4, 1905, and in which a petition for rehearing was recently denied.

Although the Trono case related to procedure in the Philippines, the court expressly decided it upon principles applicable to the Federal courts in this country. There is no difference in principle between it and the present case, and the broad rule announced therein necessarily includes one like this. The court said:

> In our opinion the better doctrine is that which does not limit the court or jury, upon a new trial, to a consideration of the question of

> guilt of the lower offense of which the accused was convicted on the first trial, but that the reversal of the judgment of conviction *opens up the whole controversy and acts upon the original judgment as if it had never been.* The accused by his own action has obtained a reversal of the *whole judgment*, and we see no reason why he should not, upon a new trial, be proceeded against *as if no trial had previously taken place.*
>
> * * * * *
>
> When at his own request he has obtained a new trial, he must take the burden with the benefit, *and go back for a new trial of the whole case.*

If the position of the defendant be correct, then the verdict of acquittal upon the third count has a greater effect than the verdict of conviction upon the first and second counts; and this court did an idle thing when it reversed the case and remanded it for new trial, since if such acquittal stands despite the reversal no new trial could be had of the matter in question. That the action of the jury in respect to the third count was noticed by this court in its consideration of the case is evident from its statement of the case wherein it is said:

> * * * The second count of the indictment was the same as the first, except that it averred the United States was "indirectly," instead of "directly," interested in the question as to whether or not a "fraud" order should be issued. *Upon the third count the jury rendered a verdict of not guilty.* Upon the fourth and fifth counts the Government entered a *nolle prosequi.*

The third, fourth, and fifth counts concededly charged but one offense, which was the same as that charged in the first and second counts, and all of these counts were based upon the payment of $500 in cash to defendant at St. Louis on the 26th day of March, 1903. (196 U. S., 286.)

THE CHALLENGES FOR CAUSE.

It is claimed that the court erred in overruling the challenge for cause made by defendant to juror William V. Jones, and in sustaining the Government's challenge to juror Hugo Koehler.

As to Jones, the record shows that while he had formed an opinion from reading the newspaper reports of the former trial, he belived he could render a verdict in accordance with the evidence and the law; that he did not know the defendent; that the opinion he had formed could exert no conscious influence over him; and that he could give to the defendant the presumption of innocence to which he was entitled throughout the trial. (R., 37–41.)

The only ground for excepting to this juror—who it is apparent from his answers was unusually conscientious—was his statement that the opinion he had formed might exert an *unconscious* influence over him. But as he was manifestly an honest, fair-minded, intelligent man, the court properly held that this uncertain and indefinite metaphysical hypothesis did not disqualify him. Moreover, he did not sit in the case, as the record shows. (R. 42.)

Koehler, on the other hand (Rec. 38–40), not only had formed an opinion which he had expressed several times, but he was personally acquainted with the defendant, and was also acquainted with Mr. Thomas B. Harlan, attorney for the Rialto Company, associate counsel with Burton during the period covered by the indictment, and a witness at the former trial, and had conversed with Harlan about the case, which conversation he admitted had had its influence in forming his opinion. (R. 38–40.)

THE NUMBER OF PEREMPTORY CHALLENGES.

Section 819, Revised Statutes, provides:

> When the offense charged is treason or a capital offense the defendant shall be entitled to twenty and the United States to five peremptory challenges. On the trial of any other *felony*, the defendant shall be entitled to *ten* and the United States to three peremptory challenges; and in *all other cases*, civil and criminal, each party shall be entitled to *three* peremptory challenges.

In creating the offense covered by section 1782, Revised Statutes, Congress declared it a misdemeanor. The power to classify offenses is necessarily involved in the power to create them. There can be no doubt as to the power of Congress to create, since there are no common-law offenses against the United States. All are of statutory origin, and can be no other than Congress declares them to be. The designation by Congress of an offense as a felony or a misdemeanor shows the degree of abhorrence with which the legis-

lature regarded it, and is a guide to the courts in determining what principles and rules should be applied in prosecuting the offender.

When Congress has failed to classify the offense, it may become the duty of the courts to determine its grade, in doing which they would be guided by the principles of the common law as to the classification of like or similar offenses. Where, however, Congress has classified an offense, the courts have nothing to do but follow that classification.

In determining the grade of an unclassified offense, the fact that the punishment imposed is or may be infamous in its character—that is, involve imprisonment in the penitentiary—does not necessarily make it a felony. That will depend upon the nature of the offense—whether it involves that depth of depravity and moral turpitude which characterize felonies at common law, such as murder, arson, burglary, robbery, etc.

The misconduct covered by section 1782 was not an offense at common law, and, while serious enough, plainly does not fall in the same category as the common-law felonies. It naturally belongs in the misdemeanor class, and was properly so termed by Congress.

In *Bannon and Mulkey* v. *United States* (156 U. S., 464) this court held that a conspiracy to commit an offense against the United States—aiding and abetting the landing of Chinese in violation of the exclusion laws—was not a felony. The statute under which the prosecution was brought (section 5440, Revised Statutes)

provides for a fine not exceeding $10,000 or imprisonment not exceeding two years, or both, but does not classify the offense of conspiracy. In delivering the opinion of the court, Mr. Justice Brown said that it was too clear for argument that a conspiracy "to commit *any* offense against the United States" was "not a felony at common law;" and, referring to offenses created by statute, he said (p. 467):

> Neither does it necessarily follow that because the punishment affixed to an offense is infamous the offense itself is thereby raised to the grade of a felony. The word "felony" was used at common law to denote offenses which occasioned a forfeiture of the lands or goods of the offender, to which capital or other punishment might be superadded, according to the degree of guilt. (4 Bl. Com., 94, 95; 1 Russell on Crimes, 42.) Certainly there is no intimation to the contrary in Mackin's case, which was put wholly upon the ground that, at the present day, imprisonment in a State prison or penitentiary, with or without hard labor, is considered an infamous punishment. If such imprisonment were made the sole test of felonies it would necessarily follow that a great many offenses of minor importance, such as selling distilled liquors without payment of the special tax and other analogous offenses under the internal-revenue and customs-revenue laws, would be treated as felonies. * * * By statute in some of the States the word "felony" is defined to mean offenses for which the offender, on conviction, may be punished by death or imprisonment in the State

> prison or penitentiary; but in the absence of such statute the word is used to designate such serious offenses as were formerly punishable by death or by forfeiture of the lands or goods of the offender.

*Reagan* v. *United States* (157 U. S., 301) was a prosecution for a violation of section 3082, Revised Statutes, relating to concealing, buying, selling, or transporting smuggled goods. The statute provides for a fine not exceeding $5,000 or imprisonment not exceeding two years, or both, but does not classify the offense. The defendant claimed 10 preemptory challenges, but the court held otherwise. Mr. Justice Brewer, after quoting with approval its language in the *Bannon* case, said (p. 303):

> But in this case we need not refer to the common law for a classification of the offense. Section 2865, Revised Statutes, provides that "if any person shall knowingly * * * smuggle, etc., every such person * * * shall be deemed guilty of a misdemeanor. * * *" By this section smuggling is *in terms declared a misdemeanor.* The penalty imposed is substantially the same as that by section 3082. * * * The latter offense is subordinate to the former. It therefore can not be an offense of a higher grade.

This plainly recognizes the right of Congress to classify offenses, and that such classification determines their character for the purpose of fixing the number of challenges allowed under section 819.

In *Considine* v. *United States*, 112 Fed. Rep., 342, a prosecution for a violation of section 5478, Revised Statutes—breaking into a post-office—which provided a fine not exceeding $1,000, or imprisonment not exceeding five years, it was contended that the offense charged was a felony, which entitled the defendant to ten peremptory challenges. The statute did not classify the offense. Mr. Justice Day (then circuit judge) delivered the opinion of the Circuit Court of Appeals. After pointing out the changed situation with respect to the test of what constituted a felony, and referring to the classification which, by statute, has been adopted in most of the States, he said (p. 345):

> Congress would have relieved the situation of much uncertainty had the general practice in State legislation been followed in dividing crimes according to punishment between the grades of felonies and misdemeanors. As this has not been done, and as there is no definition of felony in the statutes of the United States, its meaning must be ascertained from the construction given to the term in Federal decisions of authority. From such authorities certain general rules may be said to have been established. *When a statute says that a certain offense shall be a misdemeanor, that fixes its character for the purpose of determining the number of challenges to which the accused is entitled, regardless of the original character of the offense.* (Citing cases.)

The judgment of conviction was therefore affirmed. An application for certiorari was made to this court, but the petition was denied. (184 U. S., 699.)

The same rule was expressly announced in *Jewett* v. *United States*, 100 Fed. Rep., 832, 840, and in *Tyler* v. *United States*, 106 Fed. Rep., 137, 138. See also *United States* v. *Coppersmith*, 4 Fed. Rep., 198 et seq.; *United States* v. *Daubner*, 17 Fed. Rep., 794, 795.

But, supposing the rule were otherwise, has the defendant any just ground for exception? So far as the record shows, the jury selected was entirely satisfactory to him, and he did not exhaust the number of challenges allowed (R., 42). Jones, to whom alone he appears to have excepted, did not remain on the jury. He made his claim to ten challenges in advance of the selection of the jury, and did not afterwards renew it. To entitle him to take advantage of the point here, he must have exhausted his three challenges and then proceeded to renew his demand by making further peremptory challenges. (*Insurance Co.* v. *Hillman*, 188 U. S., 208, 211, 212; *State* v. *Fournier*, 68 Vt., 262, 266; *Allen* v. *Waddill*, 26 S. W. Rep., 273.) The right to challenge is the right to reject, not to select a juror; and if from those who remain an impartial jury be obtained, the constitutional right of the accused in that respect is preserved. (*U. S.* v. *Marchant*, 12 Wheat., 480, 482; *Hayes* v. *Missouri*, 120 U. S., 68, 71.)

AS TO WHETHER THERE WAS SUFFICIENT EVIDENCE OF GUILT TO BE SUBMITTED TO THE JURY.

The present record, it is believed, presents a much stronger case against the defendant than that before the court on the former appeal, and deserves a more

decided affirmation of its sufficiency. Some new testimony was introduced—notably that of Charles H. Brooks—and the significance of that presented at the former trial more clearly brought out.

The case, as presented by the evidence, is as follows:

The Rialto Grain and Securities Company was organized and incorporated at St. Louis on September 2, 1902. (Rec., p. 43.) The company was the successor of the Brooks Brokerage and Commission Company, and dealt largely in margins on grains and securities. In short, it was an incorporated bucket shop. The Brooks Brokerage and Commission Company was organized and operated by Charles H. Brooks, who, in June, 1902, entered into an arrangement with Hugh C. Dennis under which Dennis took charge of the business of the company. A controversy between Brooks and Dennis subsequently ensued, Brooks claiming a right to reenter the company and Dennis denying that right. Charges were preferred against the company by Brooks, the result being an investigation by the Post-Office Department as to whether the Brooks Company was operating a scheme to defraud through the medium of the United States mails. Owing to the controversy with Brooks and the complications that ensued, it was no longer practicable, nor, indeed, possible, to continue business under the old name, and the result was the reorganization of the Brooks Company under the name of the Rialto Grain and Securities Company, which continued to occupy the same offices and to engage in the same business as the old company. (R., 112, 129.)

The Rialto Company's business was conducted almost exclusively through the United States mails, the company having a capacity of getting out several thousands of letters a day. (R., 131, 144.) It is obvious that the continued use of the mails was vital to the existence of the company, and that the issuance of a fraud order would have abruptly terminated that existence. It was expected that Brooks's fight on the old company would result in an indictment against Dennis as manager of that company for use of the mails in a scheme to defraud. (R., 112, 113.) Facts warranting an indictment would, of course, have imperatively demanded the issuance of a fraud order by the Post-Office Department. That this was well known to and anticipated by Dennis is evidenced by the organization of the Rialto Company, so that when an indictment was returned against him and others connected with the old company, that company had ceased to exist, although the business really continued under another name.

It is significant that although, as Harlan testified, Dennis controlled the company (R., 127) his name does not appear in its articles of incorporation, either as an incorporator or as a member of the board of directors (R., 43, 44).

The nature of the business transacted by the Rialto Company soon caused complaints to be made to the Post-Office Department, the first of these complaints reached the Department October 31, 1902 (R., 50, 89); the second, November 1, 1902 (R., 48, 88); the third,

November 4, 1902 (R., 71, 89); and the fourth, January 16, 1903 (R., 67, 89). The first two complaints were, on November 7, 1902, sent to the post-office inspector in charge at St. Louis for investigation and report (R., 95).

The third and fourth complaints were sent to St. Louis for the same purpose on November 8, 1902, and January 21, 1903, respectively (R., 97, 99, 100). The first complaints were received at St. Louis on November 10, 1902 (R., 106), and *a preliminary investigation of the Rialto Company* was made on *November 14, 1902* (R., 107, 109). This preliminary investigation was made at the offices of the Rialto Company, and the fact that this investigation was being made was brought to the personal attention of Thomas B. Harlan, who was the attorney and representative of the company (R., 107, 109, 230).

*On the 17th of November, 1902*, three days after the preliminary investigation of the Rialto Company, and while a general investigation was pending, Burton appears on the scene for the first time (R., 112, 127). In company with one Kastor he appeared at the Rialto Building, in which the Rialto Company was located, and Harlan, at the suggestion of Dennis, accompanied Burton and Kastor to the depot, from which place they proceeded by train to Chicago (R., 127). Harlan testifies that he explained to Burton all about the Brooks Company and the trouble it had experienced and was then having with the Post-Office Department (R., 128), and that he also explained in great detail the nature of

the business conducted by the Rialto Company (R., 129, 131), and that Burton asked, "Now, how are you going to avoid any trouble with your Rialto Company?" (R., 132), and later, "Now, with your Rialto Grain and Securities Company, how are you going to avoid any similar difficulty, any trouble with the Post-Office Department with your Rialto Company?" (R., 45); that he made it plain to Burton that the Rialto Company was doing an extensive business through the mails (R., 144).

After a very full discussion Harlan suggested to Burton that he become associated with him "*as counsel for the Rialto Grain and Securities Company*" (Harlan's testimony, R., 130, 132, 133). Harlan says Burton finally proposed to represent the company at a salary of five hundred dollars per month for a period of not less than five months (R., 132, 133). Burton in his testimony says of this interview on the train: "There was a very elaborate discussion of the business and purposes of the Rialto Grain and Securities Company, that is, I mean the kind of business it contemplated" (R. 234).

Harlan returned to St. Louis from Chicago on the morning of the 18th, and Burton went to Washington. Soon after Harlan's arrival he presented to the Rialto Company Burton's proposal, which was immediately accepted by the company, and Harlan evidently by prearrangement thereupon wired Burton to that effect. Later in the day (November 18) he wrote Burton in part as follows:

> Mr. Kastor and I arrived safely and on time this a. m. I found myself confronted with a number of engagements, which, together with Major Dennis's condition, prevented me from wiring you at as early an hour as I expected. However, I hope you received my message to the effect that this company *accepts your terms* to act as counsel at a salary of $500 per month, said services to begin immediately; that is, of this date, November 18, 1902 (R., 112).

In this letter Harlan restated the Brooks matter at length, and referred to the possible indictment of Dennis, but added:

> Up to the present time no indictment has been found. The Federal grand jury will probably be discharged this week. I do not know what reports have been sent into the Post-Office Department at Washington, nor am I prepared to say that the Government intends to make a case against Major Dennis; but if you can find it convenient to inquire of these facts at the Department, you may be able to perform for us a great service at this time. Should any action be taken here by the grand jury, I shall wire you at once. (R., 113.)

Upon the receipt of this letter Burton, as appears from his letter of the 20th in reply, went at once to the Department (R., 114). His letter shows, however, that he appeared there not simply as attorney for Major Dennis, as he afterwards represented, but as attorney for the company, and is entirely inconsistent with his contention that it was understood that he was

to have nothing to do with matters concerning the company before the Post-Office Department.

He tells Harlan that he has found "that there are two complaints lodged against your company." He advises that all complaints receive special attention by the company, adding "especially should this be your motto until after this Brooks matter is entirely out of the way." He says further, "*I have arranged with the Department to be advised in case any complaints are made against your company, and have arranged for a hearing if any hearing should become necessary.*" Obviously he was referring to a hearing as to whether a fraud order should be issued against the Rialto Company. "I have assured the Department," he says, "that it is the purpose of your company to comply strictly with the law, and that it is your desire to remain at all times in perfect harmony with the Department." This significant sentence follows: "*No action of any kind will be taken against you without my first being notified, and every opportunity for a full explanation or hearing will be had.*" It is equally clear that Burton meant that no fraud order would be issued by the Department without giving him notice. The next sentence plainly shows his understanding of the nature and scope of his employment, for he says: "*In return*, if agreeable, you may make remittance for my first month's pay."

Notwithstanding the clear and unequivocal statements in this letter as to the assurances he had offered in behalf of the company and the arrangements he had made to protect it against hostile action by the Department, Burton testified at the trial that he went

to the Department on this occasion simply "to satisfy myself with respect to the standing of this company in the Department. That was the motive of the inquiry" (R., 258).

Chief Inspector Cochran testified that when Burton appeared before the Department on this occasion "he asked whether any complaints had been received, *or any investigation was under way*, with reference to the Rialto Grain and Securities Company," and that he "*told him there was such a case* and gave him the name of the complainants on whose complaint the case was jacketed" (R., 159). Upon being asked whether the information that he gave Burton was information to which anyone inquiring was entitled to, Cochran said that he would have given anyone inquiring, probably, the fact that a case had been made up, but that he would not have given to him the names of the complainants." The names he said he gave to Burton "because he was a Senator of the United States" (R., 159–160). Cochran also testified that Burton *said to him* on this occasion that the Rialto Company was all right (R., 174).

That Burton's proposal contemplated immediate service upon its acceptance is certain from Harlan's letter of November 22 to Burton, for in that letter he inclosed "the company's check for $500, as per agreement. This check should have been sent in my former letter, but I neglected to do so." The former letter was the letter of November 18 notifying Burton of the acceptance of his terms. (R., 115.)

On December 2 Harlan wrote Burton at some length, the letter beginning as follows:

> On Saturday night I wired you that indictments had been returned, bonds given, etc. * * * Thus you see that all efforts to prevent this action were defeated almost before we got started. *The question is how to meet the situation as it now exists.* As was to be expected, the fact of the indictments was telegraphed as a news item all over the country. To-day's mails have brought in several communications threatening in their nature, and the balance of the week will probably bring a great many more. * * * In all such cases we have determined to stand strictly on our rights, *and the result will probably be numerous complaints pouring into Washington* from different parts of the country. * * * *Locally*, I believe we will be able to control the situation, as this business has been pretty thoroughly gone over by the inspectors, and they understand just what we are doing and how we are doing it. *At your end of the line you will, of course, use your own judgment in handling the situation.* We will at all times be glad to observe any request made by the Post-Office Department, or to submit to any examination that they may direct. (R., 116, 117; italics mine.)

Harlan testified that the telegram of Saturday night "was in substance the same as the language contained in the letter referring to the telegram." (R., 197.) Burton did not deny receiving either the telegram or the letter, but it will be noted that he did not produce the telegram.

Mr. Paul V. Keyser, an assistant attorney in the office of the Assistant Attorney-General for the Post-office Department, testified that Burton appeared at that office before 9 o'clock on Monday, December 1, 1902, and "asked for the head of the office." Mr. Keyser remembered distinctly the date because Burton directed attention to the fact that Congress convened on that day, and that he had to be at the Capitol at 12 o'clock. (R., 181.) Keyser turned Burton over to Francis C. Huebner, who was also connected with the office, and who testified that Burton waited about half an hour to see Mr. Tyner, the head of the office, and that he was with Mr. Tyner for about half an hour. (R., 183.) Burton does not attempt to deny that he went to the Department as detailed by these two witnesses, neither does he deny that he saw Assistant Attorney-General Tyner on that occasion. He simply disclaims any recollection of the matter. He admits that he was but little acquainted with Mr. Tyner, and notwithstanding that he appeared at the Department before office hours and waited for half an hour, and was closeted with Mr. Tyner for a like length of time, he is unable to give any explanation as to why he was there. (R., 248, 249.)

I submit that a careful reading of the letter of December 2d and the testimony of Harlan previously referred to as to the contents of the telegram he had sent Burton on the Saturday night before furnish ample explanation as to Burton's motive and purpose in going to the Post-Office Department before office hours on

Monday morning and interviewing the officer of that Department charged under the regulations of the Department with the duty of recommending the issuance of fraud orders, and who, when such action was necessary, had authority to summarily direct the holding of the mail in any case pending final action by the Postmaster-General (R., 48).

Harlan knew when he telegraphed Burton on the Saturday night before that, notwithstanding that the Rialto Company would probably be able *locally to control the situation* and prevent a hostile report being forwarded to Washington it would not be able, unaided, to prevent summary action being taken by the Post-Office Department at Washington by reason of the developments at St. Louis. For that reason he wired Burton Saturday night, and Burton exercised his best judgment, as to what was necessary to be done at his "end of the line" to prevent action being precipitated by appearing at the Post-Office Department *before office hours Monday morning* and having an interview with the Assistant Attorney-General for that Department. He evidently assured Mr. Tyner, as he had assured Mr. Cochran, that the Rialto Company was all right, and that there was no necessity for summary action pending the report of the investigation then being conducted at St. Louis. At all events, his mission was successful, because no action of any kind was taken. (R., 116.) Another reason for believing that Burton went to the Department on this occasion to prevent summary action against the Rialto Company is found in his testimony on cross-examination when

he was asked to explain why in his letter of November 20th (R. 114) he had advised Harlan to take care of all complaints until the Brooks's matter was out of the way. He says: "I do not have any independent recollection of dictating the letter, but I take it that the reason was that *the indictment of Dennis being made public and Dennis owning the Rialto Grain and Securities Company*—in fact, I never disassoci[ate] the two; when I thought of the Rialto Grain and [Se]urities Company I thought of Dennis, and when I [th]ought of Dennis I thought of the Rialto Grain and [Se]urities Company—*would naturally cause more or l[ess] excitement and complaints might be sent in;* and my [ad]vice to him was to take care of it." (R. 244-245.)

Harlan's letter of December 3 to Burton, and Burton's reply furnish additional and convincing proof of the true relation between the Rialto Company and Burton, and of Burton's complete understanding of the pendency of a fraud order proceeding and the manner in which the investigation incident to and a part of such proceeding was being conducted. In his letter of the 2d, as we have s[een] Harlan was most apprehensive that a fraud ord[er] was imminent, so apprehensive, in fact, that on t[he] next day, December 3, he wrote Burton that on J. H. Bowman, representing himself to be a post-[office] inspector, and who had an account with the Ri[alto] Company, had called at the office of the compan[y] and "undertook to use his official position to forc[e] settlement of his account contrary to his just rig[hts], and did succeed, by reason of

his representation, in getting a little the best of the company." The letter continues:

> Now, this morning's mail brings us a letter from Colorado Springs from a Mr. Shove, which I inclose to you, and which indicates that some officer of the law—presumably some one that would leave the inference that he was a post-office inspector—had called on Mr. Shove. It is my opinion that these fellows are not what they represent themselves to be. *But if they are post-office inspectors then it would appear that some order has been issued—evidently from head-quarters—to try to catch the Rialto Company in a trap.* This they can not do by any honest methods, nor is the matter one of much consequence, except we would like to know if we are being investigated in this manner. * * * To-day's mails have brought in a number of letters inclosing newspaper clippings, but most of the letters are very fair, and *if the situation gets no worse than it now appears*, the Rialto Company will have but little trouble in getting through with the situation. *Will keep you fully informed.* (R., 118.)

On December 9 Burton replied saying:

> *There has gone from this office* (Post-Office Department) *no instructions whatever about the Rialto Company, and there is nothing in this office against you at this time. The matter in St. Louis, as you know, is in the hands of Mr. Dice there.* * * * *I will take care of things at this end of the line.* (R., 119.)

When Burton used the expression, "the matter in St. Louis," he had reference to the investigation incident to the fraud order proceeding, and when he said it was in the hands of Mr. Dice, the inspector in charge at St. Louis, he thereby admitted that he knew not only about the procedure incident to such an investigation, but that such investigation had been ordered and was actually under way.

Burton's letter of January 19 to Harlan conclusively shows that it must have been originally understood that his services would begin immediately upon the acceptance of his proposal, for he says, speaking of the overdue draft for his salary, "As you recall it was due the 15th; this is the 19th. After this shall I make draft on the 15th?" (R., 120.) It will be remembered that Harlan in his letter of the 22d (R., 115) said that the draft should have been sent in his prior communication, that is, in the letter accepting Burton's terms to act as counsel. That this is the correct interpretation of the original agreement is further evidenced by the letter of January 22, 1903, addressed to Burton and signed "Rialto Grain and Securities Company, Hugh C. Dennis, president" (R., 122).

It is also clear from these two letters that the criminal trial of Dennis on the indictment based upon his connection with the Brooks Company had little, if anything, to do with the employment of Burton by the Rialto Company. In his letter to Harlan of the 19th, Burton casually says, "Have heard nothing from

you about the case. Please tell me how you came out." And Dennis, in his letter of the 22d, excuses Harlan's failure to forward the check by his interest in the Federal case against him, "which closed, as you *probably* know, by the court throwing the case out," etc.

On February 11, *nearly a month after the indictment against Dennis had been disposed of*, we find Burton writing Harlan and admonishing him *not to let Dice, the post-office inspector in charge at St. Lous, mislead him in any way.* Burton also says in this letter, "be sure and keep me advised if there is anything to do at this end of the line before going away. * * * If agreeable, on receipt of this, I wish you would have my monthly pay sent in so I can reach it by Monday next" (R., 124). Obviously Burton was referring to services before the Post-Office Department and in respect to the fraud order proceeding, on account of which Dice was then conducting an investigation at St. Louis of the Rialto Company.

Sometime in February, 1903, W. D. Mahaney, vice president of the company, became its active manager owing to the illness of Dennis (R., 156). That Burton had knowledge of the change, and fully understood the position of Mahaney in respect to the management of the company, is clear from his telegram of February 17, as follows: "Mr. W. D. Mahaney, Rialto Building, St. Louis, Mo.: Did you send paper Saturday? It has not arrived. J. R. Burton." (R., 154.) The "paper" referred to was a check, which Mahaney hastened to wire him had been forwarded.

If any further evidence was needed to conclusively establish the fact that Burton's employment contemplated and did, in fact, embrace services before the Post-Office Department, and in respect to all proceedings, controversies, investigations, and matters touching the issuance of a fraud order against the Rialto Company by the Post-Office Department, that evidence is found in the telegram sent Burton by Mahaney as manager of the Rialto Company on February 25, 1903, more than a month after the criminal proceedings against Dennis had been disposed of, in which Mahaney says:

> *Report to me to-day from apparently reliable source that two special inspectors have been appointed to investigate us and report to Postmaster-General. Please verify and advise at once.* (R., 155.)

Burton did verify and did advise by telegram dated February 27, as follows: "*No complaint in the Department against you. Will write full particulars by to-night's mail.*" (R., 155.) The letter which contained "full particulars," Mahaney testified was destroyed at Burton's request during the interview with Burton in the offices of the Rialto Company, at St. Louis, on March 26, 1903. (R., 149, 155.) Another of Burton's letters was also destroyed upon this occasion at his request.

For obvious reasons it is not customary for the Post-Office Department to notify those operating schemes to defraud when an investigation is to be made, and especially is this true when a special investigation is deemed necessary. Burton did not

hesitate, however, to ascertain whether a special investigation was contemplated by the Department by post-office inspectors other than those already detailed to the work at St. Louis. Had such a special investigation been contemplated, its purpose would have been thwarted by Burton in thus notifying the Rialto Company in advance. This was certainly service for which he was to receive and did in fact receive compensation.

In this telegram of February 27, notwithstanding his testimony on the witness stand, Burton furnishes convincing proof that he had knowledge of all complaints against the Rialto Company that had been received at the Post-Office Department up to that time, for his telegram states unequivocally that there was then no complaint *in the Department* against the company. He admits that he personally obtained this information at the Department. (R., 245–246.)

We have already seen that he had on November 20, 1902, the occasion of his first appearance before the Department in behalf of the Rialto Company, ascertained that complaints against the company were sent to St. Louis for investigation (R., 114, 119, 124), but that a carbon or duplicate jacket containing the names of all complainants was retained at the Post-Office Department (R., 94, 97, 159).

When, therefore, Burton made this inquiry, on February 27, the duplicate jacket in this case was necessarily referred to, that being the only record of the case then in the Department, and he was unquestion-

ably given "full particulars," as he had been on November 20; that is, the names of complainants and the fact that the complaints had been sent to Inspector in Charge Dice at St. Louis for investigation. It was precisely this information that enabled Burton to state in his telegram that there was no complaint *in the Department* against the company. Obviously, they were not in the Department as they had been sent to St. Louis. But for the destruction of Burton's letter containing "full particulars," I would be able to demonstrate with his own words the accuracy of this statement. (R., 155.)

On March 26, 1903, Burton appeared at the offices of the Rialto Company in St. Louis, and was there paid $500, the balance of the $2,500 due him from the Rialto Company. (R., 146, 147.) Mahaney testified that he then informed Burton that, inasmuch as Congress had adjourned and Burton's services were no longer needed at Washington, the company would discontinue its relations with him, and that Burton assented; that Burton agreed "that there was nothing of a dangerous character pending at the Department." (R., 149.) Hector C. McRae, comptroller of the company, was present during part of this interview and remembered Burton stating that "prior to his leaving Washington he had called at the Department and found there was nothing against the company; no complaints against the company." (R., 194.)

It will be noted that it was claimed by Burton, and conceded by the company, that his compensation should

commence as of November 15 (R., 120). Upon the present theory of the defendant the company was entitled to his services until April 15 at least, by reason of the payment of March 26. It is clear that his services were required, and were valuable to the company only while he was in Washington, where he could "take care of things at this end of the line."

As Mahaney testified, the fact that Congress had adjourned and Burton had left Washington, caused the company to relinquish its right to call upon him for services to which the company was entitled and for which he had been paid. He had protected the company when danger was imminent and the necessity for protection great, no new complaints were then being sent to the Department at Washington, and "locally" the company did not require his services as the investigation at that end of the line for some reason was not being vigorously pushed to a conclusion. For these reasons the company was willing to pay him the balance of his twenty-five hundred dollars and let him go his way.

On or about January 23, 1904, the day the first indictment of Burton was made public at Washington, Burton was interviewed, about 2.30 or 3 o'clock in the afternoon, by Mr. J. H. Aubere, a newspaper correspondent representing the St. Louis Globe-Democrat, and dictated a statement to Mr. Aubere. Mr. Aubere reduced the statement to writing, and at the trial produced the original interview and testified that "the

paper and the one that accompanies it is exactly what was said by Burton." (R., 189, 191.)

In this statement, it should be noted, Burton claims he was employed as attorney for *Major Dennis*, and called at the Department simply in behalf of *Dennis*. Elsewhere both Burton and Harlan state that he was employed as attorney for the Rialto Company, and it appears that he consented that his name should appear on its literature as its attorney (R., 198), and his name did, in fact, so appear (R., 74).

About 4 o'clock of that day Burton procured an interview with Chief Post-Office Inspector Cochran and Inspector in Charge Vickery, and stated to them, in substance, that he had appeared at the Department as an attorney for the Rialto Company and not in his capacity as Senator. He asked Cochran "what section of the law he was charged with violating" and was given its number. (R., 165, 178, 179.) During cross-examination Mr. Vickery said:

> The fee was for his appearance, as he related to Mr. Cochran—his appearance before the Department as attorney, because he quoted that he mentioned to Mr. Cochran on his visit with Mr. Cochran that he wouldn't antagonize the Department. (R., 179.)

The "visit" referred to was one of Burton's appearances before Cochran at the Post-Office Department in behalf of the Rialto Company.

After his interview with Cochran and Vickery he, Burton, went to Aubere's office and added to the statement which he had dictated to Aubere in the afternoon and in which he had said that on the occasion of certain visits to the Department he had repeated to Cochran his previous statement that he "was not there to oppose the wish, order, or rule of the Department in any shape, manner, or form," this significant clause, "*nor to act as an attorney before the Department for him*," meaning Dennis (R., 192). It is evident that between these interviews he had carefully read the statute and was trimming his sails and readjusting his position accordingly.

Charles H. Brooks, the originator of the Brooks Company, and concerning whom Burton had been fully and adequately informed by Harlan both in the conversation on the train to Chicago and in the letter of November 18 (R., 112), testified that he met Burton at McTague's restaurant, in St. Louis, early in January, 1903; that he (Brooks) was then president of the National Securities Company, another get-rich-quick concern operating through the use of the mails; that about 3 o'clock that afternoon Burton and Richard Kastor appeared at the office of the National Securities Company, and that Kastor thereupon, in Burton's presence and within his hearing, announced to Brooks that Burton was willing to represent the company before the Post-Office Department at Washington (R., 199–201).

Upon being assured by Brooks that the business of the National Securities Company was legitimate, Kastor said "that the Government *was investigating all*

*speculative houses in St. Louis*, and that it was only a question of time before they investigated my business." And he said: "If they do investigate your business Senator Burton can be of use to you before the Post-Office Department." Brooks asked "in what way the Senator could stop the investigation, or in what way he could render any assistance." Kastor answered, pointing toward Burton, "*Here's the man who has defeated you in your fight against Dennis and stopped the issuance of a fraud order.*" Brooks thereupon capitulated, and concluded that he had better also employ Burton to protect his business (R., 200, 201). Moreover Mahaney and McRae each testified that Burton in the interview of March 26 assigned as a reason for the destruction of his letters the fact that he had been criticised because of the *use made by the National Securities Company* of a letter signed by him (R., 149, 194). This testimony directly corroborates Brooks. The Brooks Company, for reasons already stated, was changed to the Rialto Company early in September, 1902, previous to Burton's employment, and Brooks testified that he had knowledge of the change (R., 201). Like Burton (R., 245), he failed to disassociate Dennis from the Rialto Company—when he thought of one he thought of the other. His fight was against Dennis and Dennis's company, under whatever name that company was known.

Burton did not deny meeting Brooks at lunch that day and admitted that he went to Brooks's office in company with Kastor, as Brooks testified. He did, however, deny that he agreed to represent Brooks, or

that anything was said about the Rialto Company. It is very significant, however, that he did not attempt to explain why he was there, and it is also significant that notwithstanding he had within a few days seen his friend Kastor, who lived in St. Louis, he did not place Kastor on the stand to corroborate his story. Brooks's testimony is reasonable and consistent. Burton's is neither.

Especial attention is directed to that part of Brooks's testimony, wherein he mentions that Kastor, during the interview between Burton, Kastor, and Brooks, said that *the Post-Office Department was investigating all speculative houses in St. Louis* (R., 200). This interview, Burton himself admits, occurred in St. Louis *early in January, 1903*, and during the very period covered by the indictment in this case. Can there be a shadow of a doubt that Burton was fully informed not only as to what was taking place in the Post-Office Department at Washington in respect to the investigation of the Rialto Company, but also as to every development at St. Louis in respect to that investigation?

The court is of course not called upon to determine the conclusiveness of this evidence. Its inquiry is limited to the question whether there was sufficient evidence of guilt to be submitted to the jury. This it is believed has been clearly demonstrated. Having in mind the situation of the parties when the agreement was made, the written statements by Burton as to what he was doing at "this end of the line" in regard to complaints against the Rialto Company, and the like statements by the officers of the company at that end

of the line as to what Burton was expected to do, and bearing in mind the letter of December 19, wherein Burton in effect said that the investigation was "in the hands of Mr. Dice," post-office inspector in charge at St. Louis (R., 119), the solicitude which Burton expressed in his letter of February 11, 1903 (R., 124), that Harlan should not let Dice mislead him in any way—Dice being the officer of the Department in charge of the investigation of the Rialto Company at that end of the line—and his telegram to the company on February 27 that he had ascertained that there was no complaint *in the Department* against the company (R., 155), his present contention that it was understood between him and Harlan in their conversation on the train that he was to be employed only with reference to the indictment of Major Dennis and the development of the securities department of the company, and was to have nothing to do with any investigation of the company by the Post-Office Department, is manifestly untrue. Nothing was ever done with the securities matter (R., 142); the indictment against Major Dennis had been dismissed, and still Burton continued busy keeping things straight at "this end of the line."

Coupling with the evidence referred to the testimony of Mahaney as to the reasons for discontinuing Burton's services after he had left "this end of the line," Brooks's testimony as to what Kastor said in Burton's presence, and manifestly at his instance, about Burton's having prevented the issuance of a fraud order against the Rialto Company in order to induce Brooks to employ him in behalf of the National Securities

Company, and Burton's equivocal and conflicting statements after his indictment as to the capacity in which he appeared before the Post-Office Department, can it possibly be said that there was no evidence whatever of Burton's guilt to be submitted to the jury?

AS TO THE PLACE WHERE THE AGREEMENT WAS MADE.

The evidence on this point was as follows:

On cross-examination by Mr. Lehmann, defendant's counsel, Mr. Harlan said (R., 130–131):

> A. The result was that Senator Burton expressed his confidence in that plan; and it was in that connection that I invited Senator Burton—I asked Senator Burton—to become associated with me as counsel for the Rialto Grain and Securities Company.
>
> By that time we had finished our lunch and went back—or forward, rather—into the library car.
>
> *I told Senator Burton, however, that I did not feel authorized to close any agreement. I told him that anything that we did would have to be taken up with Major Dennis and receive his confirmation and approval.*
>
> But, as I say, after we had gone into the library car I asked Senator Burton what, *in the event of his employment*, compensation he would expect; and after thinking for a moment he replied that he thought he should receive $500 a month. To that I made no reply; but, continuing, he said, "I don't think I ought to be shut off, however, at the end of a month. For instance, I would not want to go down and try that case, should Major Dennis be indicted, and then have

this employment cut off." He says, "I think it ought to continue for at least five months." I replied, "Why, certainly; that is only fair."

* * * * *

Question. You say *his proposal* was to serve for five hundred dollars a month, and for a period of not less than five months. What was said in that conversation as to when that employment was to begin?

Answer. There was nothing said as to when the employment was to begin.

Question. Do you recall when there was first anything said about when the employment was to begin? I call your attention to the letter of November 18, 1902, particularly the first paragraph of that letter, and ask you to read it.

Answer. "Mr. Kastor and I arrived safely and on time this a. m. I find myself confronted with a number of engagements which, together with Major Dennis's condition, prevented me writing you at as early an hour as I expected. *However, I hope you received my message to the effect that this company accepts your terms to act as counsel at a salary of five hundred dollars per month, said services to begin immediately, that is, of this date, November 18, 1902.*"

Question. When was that feature first stated? Was it in that letter, is what I want: the date of beginning?

Answer. Yes, sir; was mentioned to Senator Burton.

Question. In that letter?

Answer. Yes, sir. It was talked over between Major Dennis and myself before I wrote this letter.

Question. But I mean as between you and Senator Burton, that letter was the first?

Answer. Yes, sir.

Question. You went on to Chicago with Mr. Burton?

Answer. Yes, sir.

Question. And left the matter in that form; *that is, he proposing to serve for five hundred dollars a month for a period of not less than five months.*

(R., p. 132–133.)

Burton, upon direct examination by his counsel, testified (R. 234–235):

> When we came to the subject of fees, he asked me what I considered right as a salary per month. I don't know just how I got at it, but I think I mentioned $500 a month; and after some dickering backward and forward, or waiting, I don't remember which, he seemed to be satisfied. I said, "Now, Mr. Harlan, of course I don't want the responsibility of a case, or helping in a case of this kind"—I am trying to remember just the words there that I used.
>
> Question. Give the substance of it.
>
> Answer. At any rate, I didn't want to be retained in a case of that kind, for a man who was rich, for $500. The case might pass off within a month. He said, "Oh, that is not contemplated at all, Senator. You can help us in this other matter that we intend to come up; and as to that matter, time can be mentioned." Whether he mentioned it or I did, it was to be $500 a month for not less than five months. And he made the remark, "It will not terminate then

unless you terminate it." Now, so far as I remember, that was the substance of what was said.

When I parted with him that night he said *he had no authority to contract, but he would recommend that I be employed.* And if it was decided to employ me that he would come to Washington for a full conference.

There was one other subject discussed on that occasion, and in what connection I do not know, and that was whether there was any way to avoid the indictment against Dennis, or the threatened indictment against Dennis, and if not, what was the best way to reach it in taking care of it.

At the former trial, in reply to a question as to why he inquired of Chief Post-Office Inspector Cochran in regard to complaints against the Rialto Company, Burton said (R., 250):

I had been employed as counsel for the company. That I had this letter from Harlan (referring to letter of November 18) telling me that the tentative employment he had made had been ratified by the company. * * *

The court charged the jury as follows (R., 259–260):

2. If there was an agreement on the part of the defendant to receive compensation for services to be rendered by him in such a fraud order proceeding, was the agreement made within the jurisdiction of this court—in other words, was it made in St. Louis, Mo.? Upon this question I charge you that if such an agreement was negotiated or tentatively effected at some other

> place, but with the understanding on the part of the defendant that it should be communicated to the Rialto Grain and Securities Company at St. Louis, Mo., to be there accepted and ratified by that company before it should become effective, and if thereafter, in pursuance of such understanding, the proposed or tentative agreement was communicated to the Rialto Grain and Securities Company at St. Louis, Mo., and was there accepted and ratified by that company without any change in its terms, then the agreement was made at St. Louis, Mo., and within the jurisdiction of this court. The fact that the defendant was notified of such acceptance or ratification by a telegram or letter sent to him at Washington would not alter this result, if the circumstances under which the negotiations were had and the tentative agreement was made were such that it can be reasonably inferred that he contemplated and assented to notice of the acceptance of his proposition being communicated to him through that medium.

This instruction was fully warranted by the evidence, and the instructions requested by the defendant on this point (thirty-ninth assignment of error) properly refused.

According to the construction placed upon the negotiations by defendant's counsel, "the matter was left in this form, he proposing to serve for $500 a month for a period of not less than five months." Harlan, as he advised Burton, had no authority to employ him. Burton's proposal, as shown by Harlan's letter of

November 18, was accepted by the company. As Harlan was to return to St. Louis and submit the matter to Major Dennis, and Burton was on his way to Washington, it was but just to assume that they contemplated further communication by mail or telegraph.

It is well settled that when acceptance of a proposal is made by letter or telegram, the contract is complete the moment the letter is mailed or the telegram dispatched, the *lex loci contractus* being the place where the letter or telegram is mailed or dispatched.

*Taylor* v. *Merchants Fire Ins. Co.*, 9 How., 390.

*Patrick* v. *Bowman*, 149 U. S., 424.

*Garretson* v. *North Atchison Bank*, 47 Fed., 867.

*Phenix Ins. Co.* v. *Schultz*, 80 Fed., 343.

Hammond on Contracts, sec. 42, note 22.

Burton's proposal was accepted as made. The circumstances attending the negotiation show that it was understood by the parties that if Burton's terms were accepted his services would begin immediately. The investigation of the Rialto Company had already commenced, the indictment of Dennis was impending, and if anything was to be done by Burton at the Post-Office Department in respect to either, as was evidently contemplated, the sooner it was done the better, for the danger of the issuance of a fraud order against the company was as imminent as the indictment of Dennis. In the absence of any stipulation to the contrary, Burton owed service to the company from the date of his employment.

The letter of November 18, 1902, notifying him of the acceptance of his terms and that his services were to begin immediately, was therefore an unconditional acceptance. That Burton's employment should begin at once and his salary be paid in advance is shown by Harlan's letter of November 22, in which he inclosed "the company's check for $500 as per agreement," saying, "This check should have been sent in my former letter, but I neglected to do so." The former letter was the letter of the 18th notifying Burton of the acceptance of his terms.

Burton's letter of January 19 also shows that the original agreement contemplated immediate service and payment in advance (R., 120).

But can any point be made of this alleged variation upon this prosecution? It is undisputed that Burton regarded the company's acceptance of his terms, as stated in Harlan's letter of November 18, as settling the matter of his employment. Accordingly, as appears from the letter of the 20th in response, he went at once to the Post-Office Department to look after the company's interests. A variation in the acceptance of the company from the terms of his proposal would only be important in the event he claimed no agreement had been reached. But he makes no such claim.

There was no agreement in the sense of the statute until the acceptance of the company had been given to the proposed arrangement. Not only the word "agree," but the other words of the statute—and it must be considered in its entirety in determining its meaning—imply a contractual relation. The statute denounces

an agreement to receive compensation for services rendered or to be rendered. There was no contractual relation, no obligation to render any services, no duty to pay, and hence no agreement to receive compensation for such services until the minds of the parties had met.

The court certainly will not construe the statute to apply to a mere offer which was never accepted. This is a penal statute, and therefore must be strictly construed; but it does not require a strict construction to hold that an offer to receive compensation for services to be rendered is not the same thing as an agreement to do so. Burton's proposal contained certain conditions which had to be accepted by the company before it could be said that he had agreed to do or receive anything. His proposal was a mere offer to violate the statute. His agreement constituted an actual violation thereof.

### AS TO THE ADMISSION OR EXCLUSION OF EVIDENCE.

In the statement of the case, as presented by the evidence, the relevancy of the testimony referred to has been clearly shown. Under this heading, however, I shall discuss briefly the principal errors assigned by the defendant.

The several complaints against the Rialto Company, filed during the period covered by the indictment—November 18, 1902, to March 26, 1905—were all admitted, together with the accompanying pamphlets of the Rialto Company, for the purpose of showing that the scheme of the company had been challenged,

its good faith attacked, and that an investigation of the company was being carried on by the Post-Office Department at that time. It will be remembered that Cochran testified that, in response to the inquiry by Burton upon his first visit to the Department, as to whether "any complaints had been received or any investigation was under way," he had informed Burton that "there was such a case," and he advised him of the Evans and Hout complaints.

These two complaints, as the record shows, were jacketed and labelled "Alleged fraudulent scheme," and referred to the post-office inspector in charge at St. Louis for investigation and report (R., 95), a carbon duplicate, likewise labelled, being retained in the jacket upon which the history and disposal of the complaints and all subsequent papers were noted (R., 93, 96, 97).

Burton knew, therefore, that a case had been made up and sent out to St. Louis for investigation and report. He was specifically advised as to the Evans and Hout complaints, and, as heretofore pointed out, his telegram of February 27, 1903, to the company, shows that he must have been fully informed as to the three other complaints which were introduced in evidence (R., 155). But whether he was specifically informed of these three other complaints is immaterial. The correspondence between him and the officers of the Rialto Company shows that he knew the investigation had not been concluded; that the company was threatened with numerous complaints because of the indictment of Dennis; and that it was necessary to keep matters right at this end of the line in order to

prevent the Department from taking action in the case, and calling on Dice for a report.

The court admitted the testimony as to the preliminary oral report made by Inspector Price to Dice about November 14 (R., 210, 213, 229), but refused to admit the written report made by Price and Piatt on August 20, 1903 (R., 216), and the letter thereon of the Assistant Attorney-General for the Post-Office Department of September 9, 1903 (R., 226).

The latter documents were properly excluded. Burton's services terminated March 26, 1903, and any action taken by the Post-Office Department after that date could not be evidence for or against him.

It is contended, however (twenty-ninth assignment of error, R., 274–275), that the report of Inspectors Price and Piatt tended to show that there had not been formulated for investigation by the Postmaster-General or the Post-Office Department any case for determining whether the Rialto Company was conducting a scheme to defraud through the mails, etc., and that the letter of the Assistant Attorney-General for the Post-Office Department (thirtieth assignment of error, R., 276) tended to show that this matter was then for the first time formulated for investigation.

It is submitted that these deductions are entirely without foundation. The evidence as to the practice of the Post-Office Department in these fraud-order proceedings shows that the investigation begins when a complaint received by the Department is referred by the chief post-office inspector to the inspector in charge in the district where the concern involved is

operating for investigation and report. All that the Assistant Attorney-General did in this case was to suggest to the Assistant Postmaster-General that the case be *again* referred to the inspectors for further investigation.

It is also claimed that the report and letter referred to tended to show that the action of the Postmaster-General had been in no wise influenced by the defendant. This contention must be based upon the assumption that the report and letter exonerated the company. It is manifest that this was not the case. The inspectors were disposed to recommend that no fraud order be issued, upon the district attorney's advice, because, with the exception of a certain deal, they thought the company had conducted a *fairly honest* business "as bucket shops that are conducted through the mail exist." As a matter of fact, however, they submitted the report and evidence without recommendation for whatever action the Department might see fit to take. (R., 225.) We can understand the reason for the district attorney's advice from the preceding statement in the report that he would place the whole matter before the grand jury.

In his letter the Assistant Attorney-General for the Post-Office Department distinctly says that he regards "the representations which are made by the Rialto Grain and Secureties Company about the amount of profits which had been secured by the company for investors, as set forth in the report of the inspectors, as false and fraudulent, and when money is obtained even

for the purpose of investment upon such representations, the fraud statutes are violated;" that "if all possible evidence be collected along these lines" he will "be glad to call upon these companies to show cause why a fraud order should not issue against them at any time the inspectors see fit to make such a recommendation;" and that "it may be the inspectors will desire to return this case with such recommendation after the criminal proceedings are over."

In the statement of the case as presented by the evidence, I have shown the relevancy of the testimony of Huebner as to the visit paid by Burton to the Assistant Attorney-General for the Post-Office Department December 1, 1902, the morning of the day Congress met. I invite the court's attention to Burton's evasive and contradictory statements in regard to this visit. (R. 248–249.) He attempts to deny all recollection of it, at the same time asserting that it had nothing to do with the Rialto Company. Standing alone, the testimony as to this visit might not have been admissible; but in connection with all the circumstances, as developed on the trial, it was, unexplained (and no explanation was offered), clearly relevant and material.

It will be observed that there is no assignment of error covering the admission of Keyser's testimony as to Burton's visit to the Assistant Attorney-General's office on this occasion. (R., 181.)

AS TO INSTRUCTIONS GIVEN OR REFUSED.

The charge of the court set the entire case, as presented by the evidence, fairly and substantially before the jury. (R., 256–265.) This was sufficient.

*Railway Co.* v. *Whitton*, 13 Wall., 270, 290.

*Tweed's case*, 16 Wall., 516.

That portion of the charge defining a proceeding within the statute (referred to in thirty-second and thirty-third assignments of error) and stating what constituted service (thirty-fifth assignment of error) was clearly right and in accordance with the ruling of this court upon the former appeal that such a case was within section 1782.

The charge of the court as to the place where the agreement was made (thirty-fourth assignment of error) and the instruction it refused to give on behalf of the defendant in that respect (thirty-ninth assignment of error) have been already discussed.

The instructions refused in regard to the matter of services and the right of the defendant to make inquiries at the Department in behalf of the company were sufficiently covered by the charge and the instructions given. (R., 260, 265, instruction 10.)

The instruction set forth in the fortieth assignment of error was properly refused. The jury would not have been justified, as a matter of law, in finding defendant not guilty even if they were of opinion that no services were rendered by Burton before the Post-Office Department during the month covered by the payment of $500 on March 26, 1903, for the reason that such payment, even in that event, must be considered not

as a gratuity, but as a stipulated sum paid and agreed to be paid for the services rendered prior thereto. That is to say, the agreement, as proved by the uncontradicted evidence, was that Burton was to be employed for a period of not less than five months at a salary of $500 per month, the first payment to be made as of the 15th of November. He was entitled under the terms of the contract to the last payment of $500 whether he rendered any services during that particular month or not.

If no service was in fact rendered during that month the payment was to be attributed to the services previously rendered. It was not a gratuity, but a part of the total sum stipulated to be paid for the services agreed to be, and which were in fact, rendered by him before the Post-Office Department in relation to the fraud order proceeding.

The other instructions asked by the defendant, as to the presumptions of innocence and good character (forty-first and forty-second assignments of error) were sufficiently covered by the charge. (R., 261.)

### SECTION 1782 IS CONSTITUTIONAL.

This statute does not interfere with the constitutional rights of the Senate or of the individual Senator. It prescribes no new qualifications for a Senator, nor does it interfere with the constitutional control of the Senate over him. It merely makes it unlawful for a Senator to do that which he has no moral nor constitutional right to do—to subvert his high office, entrusted to him for the benefit of the people of the United States, to the purposes of private gain.

The constitutional rights of Senators lie in the performance of their constitutional duties—that is to say, in the making of laws and treaties, etc. They have no constitutional right to appear for hire and against the interests of the Government before any of the Executive Departments or bureaus of the Government in any matter in which the United States is interested. In fact, that is plainly inconsistent with their Senatorial duties and obligations. With the performance of their constitutional duties as Senators no act of Congress could properly interfere. But when they forsake those duties and engage in matters plainly in conflict with their official obligations they must be amenable to law like other servants of the Government.

The Constitution itself recognizes this amenability of Senators and Representatives. They are privileged from arrest during their attendance at the session of their respective Houses in all cases "except treason, felony, and breach of the peace." (Art. I, sec. 6.) These words, Mr. Justice Story said, are the same as those in which the privilege of members of the English Parliament was expressed, and, as all crimes are offenses against the peace, the phrase 'breach of the peace' should be construed in accordance with the parliamentary rule to extend to all indictable offenses. (1 Story on Const., sec. 865.)

The provision of section 5 of Article II which authorizes each House to compel the attendance of absent members must be construed in the light of the above provision, which recognizes that members may be arrested for crime and the Senate thereby deprived of their attendance.

Counsel for plaintiff in error concede that a Senator is not above the law—the criminal *statutory* law—but say that "Congress has no constitutional power, by legislation, to place any limitations or restrictions upon his *official conduct* as a Senator."

Does section 1782 place any restriction upon the "official conduct" of a Senator? Will it be said that when a man who is a Senator of the United States agrees to act as the paid attorney of a corporation before a Department of the Government in matters in which the United States is interested he is engaged in the performance of his official duties? We think not.

Section 1782 applies to individuals. It is aimed at all persons holding positions of trust or confidence in the service of the United States. The fact that it specifically refers to a Senator can not invalidate it. A general law against bribery or other crime would, counsel admit, include a Senator. Would the enumeration of Senators among those included in such a law invalidate it?

The provision of section 1782 that every person offending against the statute "shall, moreover, by conviction therefor, be rendered forever thereafter incapable of holding any office of honor, trust, or profit under the Government of the United States," is not open to constitutional objection. It does not interfere with the authority of the Senate over its members, because the position of Senator can not be construed to be an office under the Government of the United States within the meaning of that section.

Upon this point Judge Story, in his work on the Constitution (second edition), said:

> Section 793: A question arose, upon an impeachment before the Senate in 1799, whether a Senator was a civil officer of the United States within the purview of the Constitution; and it was decided by the Senate that he was not; and the like principle must apply to the members of the House of Representatives. This decision, upon which the Senate itself was greatly divided, seems not to have been quite satisfactory (as it may be gathered) to the minds of some learned commentators. The reasoning by which it was sustained in the Senate does not appear, their deliberations having been private. But it was probably held that "civil officers of the United States" meant such as derived their appointment from and under the National Government, and not those persons who, though members of the Government, derived their appointment from the States or the people of the States. In this view the enumeration of the President and Vice-President as impeachable officers was indispensable, for they derive, or may derive, their office from a source paramount to the National Government. And the clause of the Constitution now under consideration does not even affect to consider them officers of the United States. It says, "the President, Vice-President, and *all civil officers* [not all other civil officers] shall be removed," etc. The language of the clause, therefore, would rather lead to the conclusion that they were enumerated, as contradistinguished from, rather than as included in the description

> of, civil officers of the United States. Other clauses of the Constitution would seem to favor the same result, particularly the clause respecting appointment of officers of the United States by the Executive, who is to "commission all the officers of the United States;" and the sixth section of the first article, which declares that "no person holding any 'office under the United States shall be a member of either House during his continuance in office;'" and the first section of the second article, which declares that "no Senator or Representative, or person 'holding an office of trust or profit under the United States shall be appointed an elector.'" If is far from being certain that the convention itself ever contemplated that Senators or Representatives should be subjected to impeachment, and it is very far from being clear that such a subjection would have been either politic or desirable.

The decisions of this court are inferentially to the same effect, as they hold that those only are officers of the United States in a constitutional sense and in the sense in which those words are employed in the statutes, who hold their places by virtue of an appointment by the President or a court of law or the head of a Department.

*United States* v. *Germaine*, 99 U. S., 508.

*United States* v. *Mouat*, 124 U. S., 307.

*United States* v. *Smith*, 124 U. S., 532.

Counsel endeavor to make a distinction between "officers of the United States" and the language of the statute, "office *under the Government* of the United

States." But if any distinction exists, we think it is against their contention. Judge Story, it will be observed, refers to Senators and Representatives as "members *of* the Government," while the provisions of the Constitution which he cites show that other positions in the service of the Government are referred to as offices *under* the United States. Section 5408, which relates to the destruction of public records by an officer of the United States and does not include Senators and Representatives, also used the phrase "office under the Government of the United States."

If Congress had intended that the effect of conviction of violating section 1782 should be to unseat a Senator or Representative, it would have said so. Certainly the court will not twist the words used from their usual sense so as to render the statute unconstitutional.

Properly read, the statute leaves the status of a convicted Senator as a member of the Senate to the determination of that body. They may or may not expel him, as they see fit. In this respect section 1782 is no different from any other statute.

It was surplusage for the court to include this declaration of the statute in its sentence. The disqualification referred to attaches by virtue of the law itself upon conviction.

If the sentence is defective in any respect, opportunity should be given to correct it. (*In re Bonner*, 151 U. S., 242.)

**THE AGREEMENT TO RECEIVE AND THE RECEIPT OF COMPENSATION FOR THE ALLEGED SERVICES CONSTITUTED TWO OFFENSES.**

Section 1782 in terms makes it unlawful to "*receive* or *agree to receive* any compensation whatever, directly

or indirectly, for any services rendered or to be rendered," etc.

It will not be denied that when any person referred to by the statute agrees to receive compensation for services to be rendered, the violation of the statute is complete, although he may never have received the compensation or rendered the services contemplated. This being so, is it to be said that he does not commit a fresh violation of the statute if he afterwards goes ahead and renders the service and receives the compensation therefor?

The receipt of compensation for such services is not necessarily preceded by an agreement. The services referred to may be rendered without agreement, and compensation afterwards received therefor. He who receives compensation for such services without a previous agreement to do so commits but one offense against the statute, while he who first agrees to receive compensation and afterwards does receive it necessarily commits two.

The case of *State* v. *Jones* (106 Mo., 302), cited by counsel, is not in point. The statute of Missouri there referred to made it unlawful for any person to "willfully *set fire to* or *burn* any dwelling house." Clearly to "set fire to" and "burn" are the same thing. But to agree to receive compensation and to actually receive it are different.

Section 1035 of the Revised Statutes, referred to by defendant's counsel, shows that an attempt to do a thing may be a separate offense.

The present case is analogous to that of a conspiracy to commit an offense against the United States, covered by section 5440, Revised Statutes, and the commission of the offense itself. In such a case the same facts may constitute two offenses, and this court has held that the punishment for the conspiracy to commit an offense may be greater than that provided for the offense itself. (*Clune* v. *United States*, 159 U. S., 590, 595.)

In *United States* v. *Rindskopf* (6 Biss., 259; Fed. Cas. No. 16, 165) it was contended that where an offense was actually committed the conspiracy was merged in the completed offense, but the court held otherwise.

But section 1782 stands upon a somewhat different ground, as it in terms creates two offenses, each of which may be committed independently of the other. In the present case we have an agreement to receive compensation, covering a period of five months and involving several payments. Manifestly, each of these payments constituted a violation of the provision against receiving compensation, and could be separately punished. Yet it is said that, if prosecuted for the agreement to receive this compensation, these several payments are beyond the reach of the statute. Clearly that can not be the case.

There being no error in the record, the judgment of the Circuit Court should be affirmed.

Respectfully submitted.

CHARLES H. ROBB,
*Assistant Attorney-General.*

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No. 539.

# In the Supreme Court of the United States.

OCTOBER TERM, 1905.

JOSEPH RALPH BURTON, PLAINTIFF IN ERROR,

v.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

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It is fundamental that this is a government of law, that no one is above the law, and that the Constitution and the laws and treaties made in pursuance thereof are the supreme law of the land.

The powers delegated to the Federal Government are vested by the Constitution in three coordinate departments—the legislative, executive, and judicial. Each of these departments is in some respects independent, in others dependent upon the others. But however independent they may be of each other, they are all subject to the Constitution and the laws enacted in pursuance thereof.

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No department of the Government can usurp the powers of the others or delegate its own powers. But this does not mean that they are entirely beyond the control of each other.

The judicial department, in the exercise of its judicial power, may control the action of the executive and legislative branches of the Government. It can compel the Executive to do his duty and restrain him from unlawful acts. It can nullify the legislation of Congress and prevent its unconstitutional oppression of the individual.

The executive department is called upon to execute the law of the land as well upon members of the legislative and judicial branches as upon all others within the jurisdiction of the United States.

All legislative powers granted by the Constitution are vested in Congress, which must make the law for all departments of the Government, as well as for individuals. In enacting legislation, whatever branch of the Government it may affect, Congress is exercising legislative power merely, and the only requirement is that such legislation be in accordance with the Constitution.

The power to make all laws which shall be necessary and proper to carry into execution the powers delegated to the Federal Government was expressly conferred upon Congress. (Art. I, sec. 8.)

Congress is authorized by the Constitution to establish post-offices and post-roads, raise and support armies, provide and maintain a navy, etc. (Art. I, sec. 8.)

In order to carry into execution such powers, Congress has established the Executive departments.

The administration of those departments belongs to the executive branch of the Government; but Congress must pass all laws necessary for that purpose.

Section 1782, Revised Statutes, is such a law. It is passed solely for the purpose of securing the due administration of the Executive departments, branches, and bureaus of the Government. It is not intended to interfere with the constitutional rights and duties of members of Congress, but to prevent members of the legislative branch of the Government, among others holding relations of trust and confidence with the United States, from interfering with the executive branch in the performance of its duties.

Members of Congress have no absolute right, because of their official position, to appear before any Executive department or bureau of the Government for the purpose of influencing official action, much less to appear for hire, against the Government, in relation to a matter in which the United States is interested. Their rights in the premises are, in law, only those that pertain to them as private persons, and Congress could, if it saw fit, forbid any individual whatsoever from appearing for hire before any department of the Government in such a case in order to secure a better administration of its affairs.

The plenary authority of Congress to protect the Executive departments was asserted in *Public Clearing House* v. *Coyne* (194 U. S., 497), where it was held that in case of conflict the rights of the individual must give

way to the rights of the public. That case related particularly to the postal establishment and the issuance of a fraud-order, and held that such an order constituted due process of law, and that all letters, etc., of the individual offending might be excluded from the mails.

When a claim is before an Executive department of the Government it calls for executive action alone, and Senators or Representatives have no constitutional right to interfere. When such a claim is before Congress it calls for legislative action, and then their constitutional powers and duties come into play.

Bearing in mind that under our system no member of the Government is above the law—a fact which, so far as members of Congress are concerned, is distinctly recognized in the provision of the Constitution excepting from their privilege to be free from arrest during the sessions of Congress cases of treason, felony, and breach of the peace; that Congress must make the law for all the departments of the Government; and that the statute in question is passed in execution of powers delegated to the Federal Government, and, so far from being inconsistent with the Constitution, is intended to preserve the rightful independence of the executive branch of the Government—it is plain that the statute is constitutional.

In what has been said we have assumed that the provisions disqualifying any person convicted of offending against the statute from thereafter holding any office of honor, trust, or profit under the Government of the United States does not refer to the office of

members of Congress. The reasons for this view are set out in the Government's original brief (pp. 59–62). Members of Congress are members *of* the Government not officers *under* the Government. In addition to the authorities cited in the original brief on this point, attention is called to 17 Opin. A. G. 419, and to section 1786, Revised Statutes, which latter section shows that Congress had in mind the fact that a member thereof could only be removed from office in the manner provided in the Constitution.

The court's attention is especially directed to *Ex parte Curtis* (106 U. S., 371), where a somewhat similar statute was construed, and in which many others of like nature, some of which related to members of Congress and judges of the courts of the United States, were referred to. In that case the court said (p. 373):

> The evident purpose of Congress in all this class of legislation has been to promote efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service. Clearly such a purpose is within the scope of legislative power.

An adverse decision as to section 1782 would also strike down section 11 of the Civil-Service Act (22 Stat., 403) forbidding Senators and Representatives, judges, and other officers and employees of the Government from soliciting or receiving political contributions.

If this were a statute abridging one's civil or political rights and privileges because of his official position a different question would be presented.

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In *Louthan* v. *The Commonwealth*, 79 Va., 196, the Supreme Court of Appeals of Virginia held that an act of that State which prohibited the active participation in politics of certain State officials, including judges, was an unconstitutional interference with the rights of the citizen. The *Curtis* case was referred to and distinguished.

On the other hand, in *United States* v. *Newton*, 20 D.C., 226, the Supreme Court of the District of Columbia held that section 12 of the Civil-Service Act, which prohibits persons from soliciting or receiving political contributions in any room or building officially occupied by any United States officer or employee, etc., applied to private citizens as well as officials, and was not an unconstitutional abridgment of the citizen's right of speech and action, the Government having a right to prescribe rules of conduct not only for officers and employees but for all persons visiting such places.

While it is not necessary to do so in this case, we may go further and assert that Congress can not only forbid interference by its members with the executive and judicial branches of the Government, but can regulate the conduct of Senators and Representatives in their official capacity; that is to say, it may forbid them, under penalties, from improperly and corruptly exercising their constitutional rights and privileges. This Congress has attempted to do in section 1781, Revised Statutes, which, among other things, prohibits a member of Congress from receiving any valuable consideration for his attention to, services,

action, vote, or decision on any matter brought before him in his official capacity.

Unless Congress can define and punish offenses committed by Senators and Representatives in their official capacity, the Government is absolutely at the mercy of corrupt members, for no other body can. That Congress can do so, arises from the fact that all legislative power conferred upon the Federal Government is vested in it. From the foundation of the Government this has been held to include the power to enact penal legislation, such legislation being necessary and proper to carry into execution the powers delegated.

*United States* v. *Coombs*, 12 Pet., 72, 78.
*United States* v. *Fox*, 95 U. S., 670.
*Frisbie* v. *United States*, 157 U. S., 166.

The basic principle underlying this whole question is, therefore, that the legislative power granted by the Constitution to Congress includes the power to define and punish offenses against the United States, and that this power is unlimited save by the provisions of the Constitution, and extends to all departments and officers of the Government, as well as individuals.

The only provisions of the Constitution which are referred to as limiting the power of Congress in this respect are those as to the qualifications of members, as to the right of each House to expel a member, and as to the right to compel the attendance of absent members.

It is manifest that none of those provisions have the effect suggested. The Constitution, in the provision as

to the privilege of members from arrest during the session of Congress, recognizes that even during its sessions the constitutional right of each House to compel their attendance may be interfered with by reason of their committing crime. The provisions as to the qualifications of the members of each House have no reference to crime, which, so far as it may disqualify them in a moral or ethical sense, is to be dealt with by each House under its power to expel. So the provision that each House may determine the rules of its proceedings, and punish its members for disorderly behavior, manifestly has reference only to maintaining proper decorum during their proceedings.

There is nothing, therefore, in the provisions referred to which supports the view that the legislative power granted to Congress does not include the definition and punishment of crimes committed by its members in their official capacity. As already said, the principle of the separation of the powers of Government which pervades our system implies nothing more than that the one branch shall not delegate its power to any other branch or entrench upon the latter's jurisdiction. The three departments, while separate and coordinate, are each necessarily subject to the due exercise of the power possessed by the others. Hence, if Congress may make the law for the separate and coordinate branches represented by the executive and the judicial departments of the Government, it may make the law for itself, so long as it does not overstep the constitutional bounds or change constitutional methods.

Statutes forbidding members of the legislature from receiving bribes exist in most, if not all, of the States. The constitutional provisions of Maine, Connecticut, New Jersey, Virginia, Indiana, Iowa, and California in regard to the qualifications of members, their privilege from arrest, and the power of each house to compel the attendance of absent members or expel them, are substantially the same as those of the Federal Constitution. The statutes of those States also provide fine and imprisonment and disqualification from thereafter holding any office or public trust. (Maine, Rev. Stat. 1902, c. 123, sec. 5; Connecticut, Gen. Stat. 1902, sec. 1260; New Jersey, Gen. Stat., sec. 24, p. 1054; Virginia, Code 1904, sec. 3745; Indiana, Rev. Stat. 1897, sec. 2122; Iowa, McClain's Anno. Stat. 1884, Title XXIV, chap. 6, secs. 3940, 3941; California, Penal Code 1897, sec. 86.) The statutes of Maine, Connecticut, Virginia, and California expressly declare that the office of the member shall be forfeited.

The power of Congress to regulate the salary of its members is unquestioned. Sections 1781 and 1782 in effect merely forbid the receipt of any other compensation than that allowed them by law.

What constitutional provision prevents Congress from making it a crime for any judge of this or any other court of the United States to receive a valuable consideration for his vote or action in any case brought before him in his official capacity? What constitutional right of the judiciary would be interfered with in such a case? And if it may thus regulate the official

action of members of a coordinate branch of the Government, why can not it so regulate the official action of its own members?

It will not be denied that Congress may regulate the official conduct of the minor officers and employees of the Government. But it is contended that it is powerless to protect the nation from those high in office, who, because of their great power and influence, are most to be feared. It will be observed that in the *Curtis* case this court evidently considered that all officers of the Government were in the same class in this respect, and none beyond the reach of the law.

Statutes of this kind in no way interfere with the constitutional rights and duties of members of Congress or the control of their respective Houses over them. Their sole object and effect is to promote the public welfare by insuring honest and legitimate service in all branches of the Government.

Respectfully submitted.

CHARLES H. ROBB,
*Assistant Attorney-General.*

O

# Supreme Court of the United States.

No. 539.—October Term, 1905.

Joseph Ralph Burton, Plaintiff in Error, vs. The United States. } In error to the Circuit Court of the United States for the Eastern District of Missouri.

[May 21st 1906.]

Mr. Justice Harlan delivered the opinion of the Court.

This criminal prosecution is founded upon the following sections of the Revised Statutes:

"Sec. 3929. The Postmaster General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any post office at which registered letters arrive directed to any such person or company, whether such agent or representative is acting as an individual or as a firm, bank, corporation, or association of any kind, to return all such registered letters to the postmaster at the office at which they were originally mailed, with the word 'Fraudulent' plainly written or stamped upon the outside thereof; and all such letters so returned to such postmasters shall be by them returned to the writers thereof, under such regulations as the Postmaster General may prescribe. . ." By the act of March 2d 1895, *c.* 191, this section was "extended and made applicable to all letters or other matter sent by mail." 28 *Stat.* 963–4.

"Sec. 4041. The Postmaster General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money or of any real or personal property by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, forbid the payment by any postmaster to said person or company of any postal money orders drawn to his or its order, or in his or its favor, or to the agent of any such person or company, whether such agent is acting as an individual or as a firm,

bank, corporation, or association of any kind, and may provide by regulation for the return to the remitters of the sums named in such money orders. . ." 26 *Stat.* 466, *c.* 908.

"SEC. 1782. No Senator, Representative or Delegate, after his election and during his continuance in office, and no head of a Department, or other officer or clerk in the employ of the Government, shall receive or agree to receive any compensation whatever, directly or indirectly, for any services rendered, or to be rendered, to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party, or directly or indirectly interested, before any Department, court martial, bureau, officer, or any civil, military, or naval commission whatever. Every person offending against this section shall be deemed guilty of a misdemeanor, and shall be imprisoned not more than two years, and fined not more than ten thousand dollars, and shall, moreover, by conviction therefor, be rendered forever thereafter incapable of holding any office of honor, trust, or profit under the Government of the United States." 13 *Stat.* 123, *c.* 119.

The plaintiff in error was indicted in the ~~Circuit~~ District Court of the United States for the Eastern District of Missouri for a violation of section 1782, the offense being alleged to have been committed at St. Louis. The accused was found guilty, and on writ of error the judgment was reversed by this court and a new trial ordered, upon the ground, among others, that according to the facts disclosed in that case the offense charged was not committed in the State of Missouri where the accused was tried. *Burton* v. *United States*, 196 *U. S.* 283.

Subsequently, the defendant was tried under a new indictment (the present one) charging him with certain violations of section 1782. The indictment contained eight counts. Stating the case now only in a general way, the first, second, fourth, sixth and eighth counts charged, in substance, that the defendant, a Senator of the United States, had *agreed* to receive compensation, namely, the sum of $2,500, for services to be rendered by him for the Rialto Grain and Securities Company, a corporation, (to be hereafter called the Rialto Company,) in relation to a proceeding, matter and thing, in which the United States was interested, before the Post Office Department, those counts differing only as to the nature of the interest, which the United States had in such proceeding, matter and thing; some of the counts alleging that the United States was directly, others that it was indirectly, interested in such proceeding, matter and thing. The third, fifth and seventh counts charged that the defendant did *receive* compensation to the amount of $500 for the services alleged to have been so rendered by him, those three counts differing only as to the nature of the interest, whether direct or indirect, which the United

States had in the alleged proceeding, matter and thing before the Post Office Department.

The defendant demurred to each count. The Government, at that stage of the prosecution, dismissed the indictment as to the fourth and fifth counts and the court overruled the demurrer as to all the other counts. The accused filed a plea in bar to the third and seventh counts. To that plea the Government filed an answer, to which we will advert hereafter. A demurrer to that answer was overruled and, defendant declining to plead further, the plea in bar was denied. He was then arraigned, tried and found guilty on the first, second, third, sixth, seventh and eighth counts. No judgment or sentence was pronounced on the first, second and eighth counts, because they covered the transaction and offense mentioned in the sixth count. And as the third count covered the transaction and offense embraced by the seventh count, no judgment or sentence was pronounced on it.

On the sixth count the defendant was sentenced to be imprisoned for six months in the county jail and to pay a fine of $2,000; on the seventh, to be imprisoned for six months in the county jail and fined $500. It was declared or recited in the judgment on each of those counts that the accused, by his conviction, "is rendered forever hereafter incapable of holding any office of honor, trust or profit under the Government of the United States."

It will be well to bring out fully the allegations of the two counts upon which the sentences were based. They will show the nature of the proceeding, matter or thing before the Post Office Department, in respect of which the defendant was indicted.

The sixth count alleged that on the eighteenth day of November 1902, the defendant was a Senator of the United States from the State of Kansas, having been theretofore elected for a term of six years expiring on the fourth day of March 1907, and the Rialto Company was a corporation engaged in the business of buying, selling and dealing in grain and securities, having its principal offices at the city of St. Louis, Missouri; that before and on the above day there was pending before the Post Office Department of the United States and before the then Postmaster General of the said United States a certain proceeding in which the United States was then indirectly interested, for determining the question whether that corporation was engaged in conducting a scheme for obtaining money through the mails of the said United States, by means of false and fraudulent pretenses, representations and promises, made by the said corporation, and whether the said Postmaster General should instruct the postmaster at the post office at St. Louis, the same then being a post office at which registered letters were then arriving, directed to the said corporation, to return all such letters to the postmasters at the several post offices at which they were or should thereafter be originally mailed, with the word "fraudulent" plainly written

or stamped upon the outside thereof, to be by such postmasters returned to the writers thereof under the regulations of the said Post Office Department, and in the same manner to dispose of all other letters and matter sent by mail to the said post office directed to the said corporation, "all of which the said Postmaster General might then have lawfully done, upon evidence satisfactory to him that the said corporation was engaged in conducting such a scheme to defraud as that in this count mentioned; and, further, that before and on the day in this count first aforesaid the facts pertaining to the questions in this count mentioned were under investigation by the said Post Office Department and the said Postmaster General and on that day were still undetermined by the said Postmaster General. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that the said Joseph Ralph Burton, Senator, as in this count of this indictment aforesaid, on the said eighteenth day of November, in the year of our Lord nineteen hundred and two, after his said election as such Senator, and during his continuance in office as such Senator, at St. Louis, aforesaid, in the Division and District aforesaid, then well knowing the proceedings in this count mentioned, in which the United States was then indirectly interested, to be, as it then still was, pending as last aforesaid, before the said Post Office Department and the said Postmaster General and undertermined by the said Postmaster General, and then well knowing the character of that proceeding, and that the said United States was then indirectly interested in the same proceeding as last aforesaid, and then well knowing all the premises in this count set forth, unlawfully did *agree* with the said Rialto Grain and Securities Company, corporation as aforesaid, by and through its officers, agents and attorneys, to receive directly from that corporation through its officers, agents and attorneys, certain other compensation, to wit, the sum of twenty-five hundred dollars lawful money of the said United States, for certain services to be rendered by him, the said Joseph Ralph Burton, to the said corporation, in relation to the last-mentioned proceeding in which the said United States was then indirectly interested as aforesaid, before the said Post Office Department and before the said Postmaster General, while the same proceeding was and should still be pending before the said Post Office Department and the said Postmaster General and still undetermined by the said Postmaster General, and after his the said Joseph Ralph Burton's said election as such Senator, and during his continuance in office as such Senator—that is to say, services consisting of his the said Joseph Ralph Burton's appearing before the said Post Office Department and before the said Postmaster General, the Chief Post Office Inspector, and the Assistant Attorney General for said Post Office Department, and other officers of said Post Office Department, as an agent of and attorney for the said corporation, and obtaining information for said corporation concerning said

proceeding in this count mentioned, in which the United States was then indirectly interested, and by the influence of his presence and of his office as such Senator, and by statements, representations and persuasion, inducing the said Postmaster General to believe that the said corporation was not conducting any such scheme to defraud as that last above mentioned, and to put a stop to any further investigation of the questions in this count mentioned by the said Post Office Department and by the said Postmaster General, and to refrain from determining the same adversely to the interests of the said corporation, and from instructing the said postsmaster at the said post office at St. Louis aforesaid to return the registered letters, and other letters and matter sent by mail aforesaid to the postmaters at the post offices at which they were or should thereafter be originally mailed as aforesaid, with the word 'Fraudulent' plainly written or stamped upon the outside thereof, as aforesaid, to be by such postmasters returned to the writers thereof as aforesaid, and also from forbidding the payment to the said corporation, by the said postmaster at the post office at St. Louis aforesaid, or postal money orders drawn to its order, or in its favor. And so the grand jurors aforesaid, upon their oath aforesaid, do say that the said Joseph Ralph Burton, at the time and place, and in manner and form in this count of this indictment aforesaid, unlawfully did offend against section seventeen hundred and eighty-two of the Revised Statutes of the said United States, against the peace and dignity of the said United States."

The seventh count alleged "that on the said twenty-sixth day of March, in the year of our Lord nineteen hundred and three, the said Joseph Ralph Burton, then still being a Senator of the said United States for the said State of Kansas, as in the sixth count of this indictment set forth, and having, after his election as such Senator and during his continuance in office, to wit, on divers days between the said eighteenth day of November, in the year of our Lord nineteen hundred and two, and the said twenty-sixth day of March, in the year of our Lord nineteen hundred and three, rendered the services in the said sixth count described, to the corporation in that count mentioned, before the Postmaster General of the said United States and before the said Post Office Department, and the same having been, as he the said Joseph Ralph Burton, when so rendering the same, well knew, services in relation to the proceeding described in the said sixth count, in which the said United States was indirectly interested, pending, as he the said Joseph Ralph Burton also well knew, before the said Post Office Department and Postmaster General, unlawfully did, after his said election and during his continuance in office, at St. Louis aforesaid, in the said Eastern Division of the said Eastern District of Missouri, *receive* directly from the said corporation through its officers, agents and attorneys, certain compensation for the same services, that is to say, five hundred dollars; he the said Joseph Ralph Burton, when so receiving such com-

pensation for the said services, well knowing the same to have been services in relation to a proceeding pending before a Department and before an officer of the Government of the said United States, and well knowing the said proceeding to have been a proceeding in which the said United States was indirectly interested, and one pending before the said Post Office Department and Postmaster General, and undetermined by the said Postmaster General, as in the said sixth count is more fully set forth: against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided."

Motions for new trial and in arrest of judgment having been denied, the case was brought here upon writ of error.

1. The first question to be considered is whether section 1782 is repugnant to the Constitution of the United States. This question has been the subject of extended discussion by counsel. But we cannot doubt the authority of Congress by legislation to make it an offense against the United States for a Senator, after his election and during his continuance in office, to agree to receive or to receive compensation for services to be rendered or rendered to any person, before a Department of the Government, in relation to a proceeding, matter or thing in which the United States is a party or directly or indirectly interested.

The principle that underlies section 1782 is not wholly new in our legislative history. For instance, by the act of March 3d 1863, 12 *Stat.* 765, *c.* 92. *R. S.* 1058, it was declared that members of Congress shall not practice in the Court of Claims. Later, Congress by statute declared that no member of or Delegate to Congress shall directly or indirectly, himself or by any other person in trust for him, or for his use or benefit, or on his account, undertake, execute, hold, or enjoy, in whole or in part, any contract or agreement made or entered into in behalf of the United States, by any officer or person authorized to make contracts on behalf of the United States; and every person violating this section was to be deemed guilty of a misdemeanor, and fined three thousand dollars. *R. S.* 3739.

Counsel for the accused insists that section 1782 is in conflict with the fundamental idea of the Federal system, namely, that the Government is one "of limited powers, with duties and restrictions imposed, and no authority is lodged anywhere to change those duties or restrictions, except the power reserved by the people." The proposition here stated is certainly not to be disputed; for it is settled doctrine, as declared by Chief Justice Marshall, and often repeated by this court, that "the Government of the United States can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given or given by necessary implication." *Martin* v. *Hunter*,

*Lessee*, 1 *Wheat.* 304, 343. We do not, however, perceive that there has been in the statute before us any departure from that salutary doctrine.

It is said that the statute interferes, or, by its necessary operation, will interfere, with the legitimate authority of the Senate over its members, in that a judgment of conviction under it may exclude a Senator from the Senate before his constitutional term expires; whereas, under the Constitution, a Senator is elected to serve a specified number of years, and the Senate is made by that instrument the sole judge of the qualifications of its members, and, with the concurrence of two-thirds, may expel a Senator from that body. In our judgment there is no necessary connection between the conviction of a Senator of a public offense prescribed by statute and the authority of the Senate in the particulars named. While the framers of the Constitution intended that each Department should keep within its appointed sphere of public action, it was never contemplated that the authority of the Senate to admit to a seat in its body one who had been duly elected as a Senator, or its power to expel him after being admitted, should, in any degree, limit or restrict the authority of Congress to enact such statutes, not forbidden by the Constitution, as the public interests required for carrying into effect the powers granted to it. In order to promote the efficiency of the public service and enforce integrity in the conduct of such public affairs as are committed to the several Departments, Congress, having a choice of means, may prescribe such regulations to those ends as its wisdom may suggest, if they be not forbidden by the fundamental law. It possesses the entire legislative authority of the United States. By the provision in the Constitution that "all legislative powers herein granted shall be vested in a Congress of the United States," it is meant that Congress—keeping within the limits of its powers and observing the restrictions imposed by the Constitution—may, in its discretion, enact any statute appropriate to accomplish the objects for which the National Government was established. A statute like the one before us has direct relation to those objects, and can be executed without in any degree impinging upon the rightful authority of the Senate over its members or interfering with the discharge of the legitimate duties of a Senator. The proper discharge of those duties does not require a Senator to appear before an Executive Department in order to enforce his particular views, or the views of others, in respect of matters committed to that Department for determination. He may often do so without impropriety, and, so far as existing law is concerned, may do so whenever he chooses, provided he neither agrees to receive nor receives compensation for such services. Congress, when passing this statute, knew, as indeed everybody may know, that Executive officers are apt, and not unnaturally, to attach great, sometimes, perhaps, undue, weight to the wishes of Senators and Representatives

Evidently the statute has for its main object to secure the integrity of Executive action against undue influence upon the part of members of that branch of the Government whose favor may have much to do with the appointment to, or retention in, public position of those whose official action it is sought to control or direct. The evils attending such a situation are apparent and are increased when those seeking to influence Executive officers are spurred to action by hopes of pecuniary reward. There can be no reason why the Government may not, by legislation, protect each Department against such evils, indeed, against everything, from whatever source it proceeds, that tends or may tend to corruption or inefficiency in the management of public affairs. A Senator cannot claim immunity from legislation directed to that end, simply because he is a member of a body which does not owe its existence to Congress, and with whose constitutional functions there can be no interference. If that which is enacted in the form of a statute is within the general sphere of legitimate legislative, as distinguished from executive and judicial, action, and not forbidden by the Constitution, it is the supreme law of the land—supreme over all in public stations as well as over all the people. "No man in this country," this court has said, "is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law, and are bound to obey it." *United States* v. *Lee*, 106 *U. S.* 196, 220. Nothing in the relations existing between a Senator, Representative or Delegate in Congress and the public matters with which, under the Constitution, they are respectively connected from time to time, can exempt them from the rule of conduct prescribed by section 1782. The enforcement of that rule will not impair or disturb those relations or cripple the power of Senators, Representatives or Delegates to meet all rightful or appropriate demands made upon them as public servants.

Allusion has been made to that part of the judgment declaring that the accused, by his conviction, "is rendered forever hereafter incapable of holding any office of honor, trust or profit under the Government of the United States." That judgment, it is argued, is inconsistent with the constitutional right of a Senator to hold his place for the full term for which he was elected, and operates of its own force to exclude a convicted Senator from the Senate, although that body alone has the power to expel its members. We answer that the above words, in the concluding part of the judgment of conviction, do nothing more than declare or recite what, in the opinion of the trial court, is the legal effect attending or following a conviction under the statute. They might well have been omitted from the judgment. By its own force, without the aid of such words in the judgment, the statute makes one convicted under it incapable forever thereafter of

holding any office of honor, trust or profit under the Government of the United States. But the final judgment of conviction did not operate, *ipso facto*, to vacate the seat of the convicted Senator, nor compel the Senate to expel him or to regard him as expelled by force alone of the judgment. The seat into which he was originally inducted as a Senator from Kansas could only become vacant by his death, or by expiration of his term of office, or by some direct action on the part of the Senate in the exercise of its constitutional powers. This must be so for the further reason that the declaration in section 1782, that any one convicted under its provisions shall be incapable of holding any office of honor, trust or profit "under the Government of the United States" refers only to officers created by or existing under the direct authority of the National Government as organized under the Constitution, and not to offices the appointments to which are made by the States, acting separately, albeit proceeding, in respect of such appointments, under the sanction of that instrument. While the Senate, as a branch of the Legislative Department, owes its existence to the Constitution, and participates in passing laws that concern the entire country, its members are chosen by State legislatures, and cannot properly be said to hold their places "under the Government of the United States."

We are of opinion that section 1782 does not by its necessary operation impinge upon the authority or powers of the Senate of the United States, nor interfere with the legitimate functions, privileges or rights of Senators.

2. It is next contended that the indictment does not present the case of a proceeding, matter or thing in which, within the meaning of the statute, the United States was a party or interested, nor adequately state the facts constituting the offense. These objections are, we think, without merit. Our reading of the statute and the indictment leads to the opposite conclusion.

The statute makes it an offense for a Senator, after his election, and during his continuance in office, to receive or agree to receive compensation, in any form, from any person, in relation to a proceeding, matter or thing before a Department, in which the United States is a party, or directly or indirectly interested. The scope of the statute is, in our judgment, most manifest, and the nature of the offense denounced cannot well be made clearer than it has been made by the words used to express the legislative intent. The business in respect of which the accused is charged to have both agreed to receive, and to have received, compensation, was plainly a proceeding or matter in which the United States was interested. That such proceeding or matter involved the pecuniary interests of the defendant's client is not denied. That it also involved the use of the property as well as postal facilities furnished by the United States for carrying and transporting mail matter must also be admitted. What the Post Office Department aimed to do in

the execution of the acts of Congress and the regulations established under those acts was to protect the mails of the United States from being used, in violation of law, to promote schemes for obtaining money and property by means of false and fraudulent pretenses, representations and promises. That statute has its sanction in the power of the United States, by legislation, to designate what may be carried in the mails and what must be excluded therefrom; such designation and exclusion to be, however, consistent with the rights of the people as reserved by the Constitution. *Ex parte Jackson*, 96 *U. S.* 727, 732; *In re Rapier*, 143 *U. S.* 110; *School of Magnetic Healing* v. *McAnnulty*, 187 *U. S.* 94; *Public Clearing House* v. *Coyne*, 194 *U. S.* 498, 508. In the proceeding, matter and thing before the Department, with which the defendant was connected as an attorney for a corporation immediately concerned in the result, the Postmaster General represented the United States, and, in the discharge of his official duties, sought to enforce a law of the United States. The United States was the real party in interest on one side, while the Rialto Company was the real party in interest on the other side. If the Postmaster General did not represent the United States, whom did he represent? The word "interested" has different meanings, as can be readily ascertained by examining books and the adjudged cases. 4 *Words and Phrases Judicially Defined*, 3692; *Stroud's Judicial Dictionary*, 399. But its meaning here is to be ascertained by considering the subject matter of the statute in which the word appears. And it is, we think, a mistake to say that the United States was not interested, directly or indirectly, in protecting its property, that is, its mails and postal facilities, against improper and illegal use, and in the enforcement, through the agency of one of its Departments, of a statute regulating such use. It would give too narrow an interpretation to the statute to hold that the United States was not interested, directly or indirectly, in a proceeding in the Department having such objects in view. It is true the business before the Post Office Department in which the Rialto Company was concerned did not assume the form of a suit in which there were parties according to the technical rules of pleading. But it was, nevertheless, in a substantial sense, a proceeding, matter or thing before an Executive Department in which both the United States and the Rialto Company were interested.

It is said that, within the meaning of the statute, the United States is not interested in any proceeding or matter pending before an Executive Department, unless it has a direct moneyed or pecuniary interest in the result. Under this view, Senators, Representatives and Delegates in Congress, who are members of the Bar, may regularly practice their profession *for compensation* before the Executive Departments in proceedings, which if not directly involving the pecuniary interests of the United States, yet

involve substantial pecuniary interests for their clients as well as the enforcement of the laws of the United States enacted for the protection of the rights of the public. Such a view rests upon an interpretation of the statute which is wholly inadmissible. In our opinion, section 1782 excludes the possibility of such a condition of things, and makes it illegal for Senators, Representatives or Delegates to receive or agree to receive compensation for such services. We may add that the judgment in *Burton* v. *United States*, 196 *U. S.* 283, proceeded upon the ground that the case then made—and the present case, as to the facts, is much stronger against the defendant—was embraced by the statute.

It is equally true that the accused was informed with reasonable certainty by the indictment of the nature and cause of the accusation against him—the two counts hereinbefore given at large, and upon which sentences were pronounced, being as full as any of the others. The averments of the indictment were sufficient to enable the defendant to prepare his defense, and in the event of acquittal or conviction the judgment could have been pleaded in bar of a second prosecution for the same offense. The accused was not entitled to more, nor could he demand that all the special or particular means employed in the commission of the offense should be more fully set out in the indictment. The words of the indictment directly and without ambiguity disclosed all the elements essential to the commission of the offense charged, and, therefore, within the meaning of the Constitution and according to the rules of pleading, the defendant was informed of the nature and cause of the accusation against him. *United States* v. *Simmons*, 96 *U. S.* 361, 362; *United States* v. *Caryll*, 105 *U. S.* 611; *Blitz* v. *United States*, 153 *U. S.* 308, 315.

3. It is insisted, however, that the court below erred in not directing the jury to acquit the defendant; in other words, that the evidence in support of the indictment was so meagre that the jury could not properly have found him guilty of any offense. We cannot assent to this view. There was beyond question evidence tending to establish on one side the defendant's guilt of the charges preferred against him; on the other side, his innocence of those charges. It will serve no useful purpose to set out all the testimony. It is sufficient to say that the whole evidence has been subjected to the most careful scrutiny, and our conclusion is that the trial court was not authorized to take the case from the jury and direct a verdict of not guilty. That course could not have been pursued consistently with the principles that underlie the system of trial by jury. The case was pre-eminently one for the determination of a jury. It was for the jury to pass upon the facts; and as there was sufficient evidence to go to the jury, this court will not weigh the facts, and determine the guilt or innocence of the accused by the mere preponderance of evidence, but will limit its decision

to questions of law. In its charge to the jury the Circuit Court held the scales of justice in even balance saying all that was necessary to guard the rights of the accused. Nothing seems to have been omitted that ought to have been said nor anything said that was not entirely appropriate. Upon the general question of guilt or innocence and as to the rules by which the jury should be guided in their consideration of the case the Circuit Court, in substance, said that the indictment was not evidence in any sense, but only an accusation which it was incumbent upon the Government to sustain by proof establishing guilt beyond a reasonable doubt; that the presumption of law was that he was innocent of the accusation as a whole and as to every material element of it, and that such presumption abided with him from the beginning to the end of the trial, and required, at the hands of the jury, an acquittal, unless a careful, intelligent, fair consideration of the whole evidence, attended by the presumption of innocence, produced in the mind, beyond a reasonable doubt, the conviction that the defendant was guilty; and that they, the jury, were the sole judges of the credibility of the witnesses and of the weight to be attached to their testimony.

The Circuit Court was equally direct and impartial in what it said in relation to the particular issues of fact raised by the indictment and evidence. After explaining the nature of the proceeding before the Post Office Department, in respect of which, the indictment alleged, the defendant acted as counsel for the Rialto Company, for compensation received and to be received, and after referring, with some fulness, to the specific charges in the several counts, the court called attention to the questions that were common to all the counts. It said to the jury: "Was the defendant a Senator of the United States for the State of Kansas during the times covered by the transactions under investigation? It is admitted that he was, and therefore you will have no difficulty in determining that. Was the Rialto Grain and Securities Company an existing corporation carrying on business of the character described during the times covered by the transactions under investigation? There was proof that it was, and no proof to the contrary, so you will have no difficulty with that. Was a proceeding pending before the Post Office Department from November 18th 1902 to March 26th 1903, to determine whether or not a fraud order should be issued against that company? If the evidence shows that the officers of the Post Office Department, at the instance of private individuals or otherwise, had before that time set on foot an inquiry to determine whether or not satisfactory evidence existed that the Rialto Grain and Securities Company was engaged in conducting a scheme or device for obtaining money through the mails by means of false or fraudulent pretenses, representations or promises, as charged in the indictment; and if the evidence further shows

that that inquiry had not been concluded, and was, during the period named, in the charge of any of the officers of the Post Office Department then charged with the performance of any duty in respect of such inquiry—then I charge you that there was such a pending proceeding before the Post Office Department, as described in the indictment, and is referred to in the statutes before mentioned; and also that it was a proceeding in which the United States was both directly and indirectly interested."

It then called the attention of the jury to the particular counts charging the defendant with having *agreed* with the Rialto Company to receive a stated compensation for services to be rendered in the proceeding before named. Touching those counts, the court said: "Did he make such an agreement? That he made an agreement of some character to act as counsel for that company for a stated compensation is conceded. The real question is whether that agreement included, among other matters in relation to which he was to serve the company, the proceeding in the Post Office Department before named. Upon that question the evidence is conflicting, and it is your duty to weigh the evidence and determine the truth. If, among other things, it was intended by the defendant and the Rialto Grain and Securities Company in making the agreement that he would, in part consideration for the compensation he was to receive, appear as agent or attorney of such company before the Post Office Department, or any of its officers charged with any duty or having any authority over such fraud order proceeding, for the purpose or with the intent of influencing or obtaining action on their part favorable to such company in said proceeding, whether by way of stopping the investigation or ultimately preventing the issuance of a fraud order: then I charge you that the agreement of the defendant was violative of the statute; otherwise it was not. The offense prescribed in the statute consists in the agreement to receive compensation for the rendition of such services. The mere agreement to render the services is not an offense. It is the agreement to receive compensation for the rendering of them which constitutes the offense. It should be carefully observed that the actual rendition of services is not a necessary element of this offense. The offense is complete and the defendant's guilt is established if the evidence shows that he made an agreement to render such services for compensation."

Coming then to the questions referring exclusively to the counts charging defendant with having *received* from the Rialto Company compensation for services rendered by him to it, the court said to the jury: "Did he render any service for the Rialto Grain and Securities Company before the Post Office Department in the proceeding named? On that question I charge you that if he appeared as agent or attorney of such company before the Post Office Department, or any of its officers charged with any

duty or having any authority over such fraud order proceeding, for the purpose or with the intent of influencing or obtaining action on their part favorable to such company in said proceeding, and did then, by any statement or representation respecting the business in which that company was engaged, or the manner in which it was conducting such business, endeavor to obtain any action favorable to such company on the part of the Post Office Department, or any of its officers, in such fraud order proceeding, then he rendered service for said company within the meaning of the statute. And I further charge you that if he appeared as agent or attorney of such company before the Post Office Department, or any of its officers charged with any duty or having any authority over such fraud order proceeding, for the purpose or with the intent of influencing them in respect of their action in said proceeding, and did then arrange with the Department, or any of its officers, that a hearing should be had in respect of such matter, and then also assured the Department, or any of its officers, that it was the purpose of said company to comply strictly with the law, and then also arranged that no action should be taken against said company in said proceeding without his being first notified thereof, that would constitute services within the meaning of the statute. Did he, at St. Louis, Missouri, on the 26th day of March 1903, receive from the Rialto Grain and Securities Company any payment of money as compensation for such services?" Here the court gave instructions, seven in number, asked by the defendant. They were not objected to by the Government and need not be set out.

4. Another point made by the defendant is that he could not legally be indicted for two separate offenses, one for agreeing to receive compensation in violation of the statute, and the other for receiving such compensation. This is an erroneous interpretation of the statute, and does violence to its words. It was certainly competent for Congress to make the agreement to receive, as well as the receiving of, the forbidden compensation separate, distinct offenses. The statute, in apt words, expresses that thought by saying: "No Senator . . shall receive *or* agree to receive any compensation whatever, directly or indirectly, for any services rendered or to be rendered," etc. There might be an agreement to receive compensation for services to be rendered without any compensation ever being in fact made, and yet that agreement would be covered by the statute as an offense. Or, compensation might be received for the forbidden services without any previous agreement, and yet the statute would be violated. In this case, the subject-matter of the sixth count, which charged an agreement to receive $2,500, was more extensive than that charged in the seventh count, which alleged the receipt of $500. But Congress intended to place its condemnation upon each distinct, separate part of every trans-

action coming within the mischiefs intended to be reached and remedied. Therefore an agreement to receive compensation was made an offense. So the receiving of compensation in violation of the statute, whether pursuant to a previous agreement or not, was made another and separate offense. There is, in our judgment, no escape from this interpretation consistently with the established rule that the intention of the legislature must govern in the interpretation of a statute. "It is the legislature, not the court, which is to define a crime, and ordain its punishment." *United States* v. *Wiltberger*, 5 *Wh.* 76, 95; *Hackfield & Co.* v. *United States*, 197 *U. S.* 442, 450.

5. The defendant invokes the protection of that clause of the Constitution of the United States which declares that no person "shall be subject for the same offense to be twice put in jeopardy of life or limb." The question arose in this way.

The first and second counts of the indictment in the former case charged that the defendant, in violation of the statute, and on March 26th 1903, unlawfully, knowingly, wilfully and corruptly took, accepted and received $500 "from the Rialto Grain and Securities Company," for services rendered in its behalf in a matter before the Post Office Department in which the United States was interested. Those two counts differed only as to the interest, whether direct or indirect, of the United States in that matter. The third count in the former indictment charged that on March 26th 1903 the defendant unlawfully, knowingly, wilfully and corruptly took, accepted and received $500 "from one W. D. Mahaney," (described as an officer and employe of the Rialto Company,) as compensation for services rendered by defendant to that company in a matter before the Post Office Department in which the United States was directly interested. The jury in the former case convicted the defendant on the first and second counts and acquitted him on the third count; in other words, they found, in effect, that he received money from the company, but not from Mahaney. Upon writ of error sued out by defendant this court reversed the judgment and sent the case back with directions for a new trial. Whether that reversal, upon defendant's own writ of error, had the effect, within the principle of *Trono* v. *United States*, recently decided, to take from him the benefit of his acquittal on the third count in the former case, we need not decide. It may be assumed, for the purposes of this discussion, that it did not.

The defendant pleaded the judgment of acquittal on the third count in the former indictment in bar of this prosecution as based on the third and seventh counts in the present indictment. In its answer to that plea the Government alleged that while the third and seventh counts of the present indictment are identical in legal effect with counts one and two of the

former indictment, "the offense charged against the defendant in said counts three and seven of the indictment herein is not identical in legal effect with said count three of said original indictment." The defendant, as we have seen, demurred to the answer. The demurrer having been overruled, and the defendant declining to plead further, the plea in bar was overruled and denied.

As no issue was taken upon the answer, by replication, the question presented is whether, upon the face of the record, *as matter of law* simply, the offense charged in the third and seventh counts of the present indictment is the same as that charged in the third count of the former indictment. This question must be answered in the negative, unless the charge, in the present indictment, that the money in question was received by the defendant "from the Rialto Grain and Securities Company" is the same, in law, as the charge, in the former indictment, that he received it "from one W. D. Mahaney," mentioned as an officer and employe of the Rialto Grain and Securities Company. We could not so hold, for the reason that the two charges do not necessarily import, in law, the same thing, The only support for the contrary view is found in the words, added after Mahaney's name, describing him to be an officer and employe of the Rialto Company. But those words are to be taken only as descriptive of the person or as identifying the person from whom, it was charged, the defendant, in fact, received the money. It was not alleged in the former indictment that Mahaney paid the money to the defendant in behalf of or by direction of the company. This distinction was manifestly in the mind of the jury in the former case; for, while they found the defendant guilty of having received forbidden compensation from the company, they found him not guilty of having received such compensation from Mahaney. The defendant may have received such compensation from Mahaney, but it may not have been paid by direction of the company. So, in a legal sense, it may have been received from the company, although paid by the hands of Mahaney. It cannot be held otherwise, as matter of law, upon the face of the two indictments, apart from any evidence. And there was no evidence in support of the plea or in refutation of the answer. The defendant simply demurred to the answer, thereby admitting its averments of fact; and, without a replication, and without any evidence, rested his defense of former jeopardy upon the face of the two indictments. As the effect of the reversal of the judgment in the former case was to set aside the judgment of conviction on the first and second counts of the original indictment, the way was opened for another trial on those counts. But the Government elected not to proceed under that indictment, but to have a new one embodying the same charge as to the $500 that was made in the former case. Its right to adopt that course cannot

be questioned. In our judgment, the defendant cannot plead his acquittal upon the charge of having received forbidden compensation *from Mahaney* in bar of a prosecution upon the charge of having received such compensation *from the company.* A plea of *autrefois acquit* must be upon a prosecution for the same identical offense. 4 *Bl.* 336. It must appear that the offense charged, using the words of Chief Justice Shaw, "was the same *in law* and *in fact.* The plea will be vicious if the offenses charged in the two indictments be perfectly distinct in point of law, *however nearly they may be connected in fact.*" *Commonwealth* v. *Roby,* 12 *Pick,* 502. Looking, as we must, only at the face of the original and the present indictments, the two charges must be regarded as separate and distinct. The plea of former jeopardy in this case presents a technical defense, and cannot be allowed for the reason that the offense of which the defendant was heretofore acquitted does not plainly appear, as matter of law, upon the face of the record, to be identical with the one of which he has been convicted in this case. If, at the trial below, under the present indictment, proof had been made that the $500 was paid by Mahaney, and that he was an officer and employe of the Rialto Company—if the proof had gone no farther—the jury would not have been authorized to find that the money was received *from the company;* whereas, the same proof would have sustained the charge in the third count of the original indictment. This shows that the two charges were not identical, in law, and that the same evidence would not have sustained each. It is well settled that "the jeopardy is not the same when the two indictments are so diverse as to preclude the same evidence from sustaining both." 1 *Bishop's Crim. Law,* § 1051; *Wilson* v. *State,* 24 *Conn.* 57, 63–4. For these reasons we hold that the court below properly sustained the answer to the plea and, the defendant not pleading further, the plea in bar was properly overruled and denied.

6. An important point remains to be considered. It relates to the jurisdiction of the court below to try the defendant for the crime alleged.

The Constitution requires that the trial of all crimes against the United States shall be held in the State and the District where *such crimes* shall have been committed. *Const. Art.* 3, § 2, 6th *Amendment.* The contention of the accused is that in no view of the evidence can he be said to have committed any offense in the State of Missouri; consequently, the Federal court, holden at St. Louis, was without jurisdiction, under the Constitution, to try him. The contention of the Government is that the alleged offense was committed at St. Louis, and that it was proper to try the defendant in the District embracing that city.

The Circuit Court thus instructed the jury: "If there was an agreement on the part of the defendant to receive compensation for services to

be rendered by him in such a fraud order proceeding, was the agreement made within the jurisdiction of this court—in other words, was it made in St. Louis, Missouri? Upon this question I charge you that if such an agreement was negotiated or tentatively effected at some other place, but with the understanding on the part of the defendant that it should be communicated to the Rialto Grain and Securities Company at St. Louis, Missouri, to be there accepted or ratified by that company before it should become effective, and if thereafter, in pursuance of such understanding the proposed or tentative agreement was communicated to the Rialto Grain and Securities Company at St. Louis, Missouri, and was there accepted and ratified by that company without any change in its terms, then the agreement was made at St. Louis, Missouri, and within the jurisdiction of this court. The fact that the defendant was notified of such acceptance or ratification by telegram or letter sent to him at Washington would not alter this result, if the circumstances under which the negotiations were had and the tentative agreement was made were such that it can be reasonable inferred that he contemplated and assented to notice of the acceptance of his proposition being communicated to him through that medium."

The jury found that the alleged agreement was consummated, that is, completed, at St. Louis. This finding was clearly justified by the evidence. There was proof that on the 17th day of November 1902 the general counsel of the Rialto Company—while he and the accused were in Illinois travelling together from St. Louis to Chicago—explained to the latter the affairs and condition of the company and invited the defendant to become counsel with him for the company; that, as the result of that conference and invitation, the defendant, being in Illinois at the time, proposed or offered to become such counsel on the basis of an employment for not less than five months at a monthly salary of $500; that he was then informed that only the company could conclude an arrangement as to compensation; that he contemplated, at the time, that his offer as to employment and compensation would be submitted for him to the company at St. Louis; that upon the return of the company's counsel to St. Louis on the morning of November 18th 1902, he at once communicated to the Rialto Company, at that city, the above offer or proposal of the defendant; that the company promptly accepted the offer, of which fact the defendant was immediately informed by telegram of November 18th 1902, sent from St. Louis, and addressed to him at Washington, by the representative of the company; that such acceptance was confirmed by a letter written and duly mailed at St. Louis on the same day, in which letter counsel, speaking for the company, said: "I hope you received my message to the effect that this company accepts your terms to act as counsel at a salary of $500 per month, and service to

begin immediately, that is, of this date, November 18 1902;" that under date of November 20th 1902, by letter addressed to the Rialto counsel at St. Louis, the defendant acknowledged receipt by due course of mail of the above letter of November 18th, and stated that he had called that morning at the Department, on behalf of the company, and had found that two complaints had been filed there against it, which had been sent out on November 7th for investigation; that the letter last referred to thus concluded: "I have arranged with the Department to be advised in case any complaints are made against your company, and have arranged for a hearing if any hearing should become necessary. I have assured the Department that it is the purpose of your company to comply strictly with the law, and that it is your desire to remain at all times in perfect harmony with the Department. No action of any kind will be taken against you without my first being notified, and every opportunity for a full explanation or hearing will be had. In return, if agreeable, you may make remittance for my first month's pay."

The evidence further tended to show that during the five months following the acceptance of his offer at St. Louis, the defendant acted as counsel for the Rialto Company before the Post Office Department when requested or when it was necessary, and received from the company a salary of $500 per month for his services to it—the salary for each of the first four months being paid by the company's check, drawn at St. Louis upon a St. Louis bank and made payable to the defendant's order, which check was sent from St. Louis to the defendant at Washington. The last month's salary of $500 was paid in cash to defendant at St. Louis, in the company's office, on March 26th 1903, on which date, with his own consent, he was discharged as the company's attorney, his services being no longer required. The evidence also tended to show that during the whole period of the defendant's employment and service as the company's attorney he relied or counted upon the acceptance of his offer on the 18th day of November 1902 as evidencing an agreement then concluded between him and the company in respect of compensation. He received the letter of November 18th by due course of mail, and does not deny having received the telegram previously sent to him, the same day, on the same subject. Nothing was said or done by him during the whole period of his service as the company's counsel that was inconsistent with the agreement established by the evidence. All that he did, said or wrote was consistent with the idea that he regarded the acceptance at St. Louis, of his offer, as completing the agreement between him and the company. From the time of such acceptance he was entitled, so far as the agreement was concerned, to demand, and he in fact received, the stipulated salary.

In view of the evidence and of all the circumstances, was the jury warranted in finding that the alleged agreement was concluded at St. Louis?

Manifestly so, we think. Although this is a criminal prosecution, that question must be determined by the principles recognized in the general law of contracts as to the time when an agreement between parties takes effect and becomes binding upon them. It is to be taken as settled law, both in this country and in England, in cases of contracts between parties distant from each other, but communicating in modes recognized in commercial business, that when an offer is made by one person to another the minds of the parties meet and a contract is to be deemed concluded, when the offer is accepted in reasonable time, either by telegram duly sent in the ordinary way, or by letter duly posted to the proposer, provided either be done before the offer is withdrawn, to the knowledge of or upon notice to the other party. A leading authority on the general subject is *Tayloe* v. *Merchants' Fire Ins. Co.*, 9 *How.* 390, 399–400. It appeared in that case that a fire insurance company made an offer by mail to insure property upon certain terms. The offer was accepted in a letter promptly mailed to the proper address of the company. The inquiry arose as to the time when the contract of insurance was to be deemed completed. This court held that, according to the settled principles of law governing contracts entered into by correspondence between parties distant from each other, the contract became complete when the letter accepting the offered terms was mailed, the offer not having been then withdrawn. The court said: "We are of opinion that an offer under the circumstances stated, prescribing the terms of insurance, is intended, and is to be deemed, a valid undertaking on the part of the company, that they will be bound, according to the terms tendered, if an answer is transmitted in due course of mail, accepting them; and that it cannot be withdrawn, unless the withdrawal reaches the party to whom it is addressed before his letter of reply announcing the acceptance has been transmitted."

In *Patrick* v. *Bowman*, 149 *U. S.* 411, 424, the court, referring to the Tayloe case, again held that when an offer is made and accepted by the posting of a letter of acceptance the contract is complete according to the terms of the offer.

Kent says: "In creating the contract the negotiation may be conducted by letter, as is very common in mercantile transactions; and the contract is complete when the answer containing the acceptance of a distinct proposition is despatched by mail or otherwise, provided it be done with due diligence, after the receipt of the letter containing the proposal, and before any intimation is received that the offer is withdrawn. Putting the answer by letter in the mail containing the acceptance, and thus placing it beyond the control of the party, is valid as a constructive notice of acceptance. An offer by letter, or by a special agent, is an authority revocable in itself, but not to be revoked without notice to the party receiving it, and never after it has been executed by an acceptance. There would be no certainty

in making contracts through the medium of the mail, if the rule were otherwise." 11 *Kent's Com.* 477.

The authorities to the same effect are too numerous to be cited, but we refer particularly to *Vassar* v. *Camp*, 11 *N. Y.* 441, 445; *Mactier* v. *Frith*, 6 *Wend.* 103; *Adams* v. *Lindsell*, 1 *B. & Ald.* 681; *Imperial Land Co. of Marseilles*, 7 *L. R. Ch.* 587; *Household Fire Ins. Co.* v. *Grant*, *L. R.* 4 *Exch. Div.* 218; *Perry* v. *Mt. Hope Iron Co.*, 15 *R. I.* 380, 381; *Wheat* v. *Cross*, 31 *Md.* 103; *Averill* v. *Hedge*, 12 *Conn.* 424; *Chiles* v. *Nelson*, 7 *Dana*, 281; *Washburn* v. *Fletcher*, 42 *Wis.* 152; *Minnesota Oil Co.* v. *Collier Lead Co.*, 4 *Dill.* 434; *Maclay* v. *Harvey*, 38 *Amer. Rep.* 40, *note and authorities cited; Levy* v. *Cohen*, 4 *Ga.* 1, 13; *Falls* v. *Gaither*, 9 *Port.* 605, 612; 2 *Redfield on Law of Railways*, 338–9; *Pomeroy on Contracts*, 95; 1 *Parsons on Contracts*, *9th ed.* 483; 2 *Ib.* 257, *note; Metcalf on Contracts*, 17; *Thompson on Law of Electricity*, §§ 425 *to* 478; *Scott and Jarnogin, Law of Telegraphs*, § 295 *et seq.; Addison on Contracts*, 16, 17. Whether the acceptance by the Rialto Company of the defendant's offer is to be regarded as effectively made by the telegram duly sent to him, or only when the letter addressed to him by the Rialto counsel was duly mailed at St. Louis, or in both ways—in any event, the acceptance promptly and adequately occurred on the 18th of November 1902 at St. Louis, on which day and at which place it is to be deemed that the minds of the parties met—the agreement becoming complete the moment of the acceptance of defendant's offer, without the necessity of formal notice to the company that Burton had received information of its acceptance of his offer.

But this, the defendant insists, is not enough to show that the alleged offense was committed at St. Louis. Counsel would seem to contend that the physical absence of the accused from St. Louis, when the offer was received by the company and when the agreement was concluded, rendered it impossible that he could have committed the alleged offense *at that city*. In substance, the contention is that an individual could not, in law or within the meaning of the Constitution, commit a crime within a State in which he is not physically present at the time the crime is committed.

The constitutional requirement is that the *crime* shall be tried in the State and District where committed, not necessarily in the State or District where the party committing it happened to be at the time. This distinction was brought out and recognized in *Palliser's case*, 136 *U. S.* 257, 265. Palliser was indicted in the District Court of the United States for the District of Connecticut for violating certain statutes relating to the disposal of postage stamps and forbidding postmasters not only to dispose of postage stamps in the payment of debts or in the purchase of commodities or to pledge them, but also to sell or dispose of them except for cash. By letter written and mailed at New York and addressed to a postmaster in Connecticut, Palliser made to that officer an offer of contract

which could not have been accepted by the latter without violating the above statutes. This court held that the offer in Palliser's letter was a tender of a contract with the intent to induce the postmaster to sell postage stamps for credit in violation of his duty, and that the case, therefore, came within section 5451 of the Revised Statutes, providing that "every person who promises, offers or gives, or causes or procures to be promised, offered or given, any money or other thing of value, or makes or tenders any contract, undertaking, obligation, gratuity or security for the payment of money, or for the delivery or conveyance of anything of value to any officer of the United States, . . with intent to influence him to commit or aid in committing, or to collude in or allow any fraud, or make opportunity for the commission of any fraud on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be punished" by fine and imprisonment.

The question arose whether Palliser, who did not go into Connecticut, could be punished in that State for the offense alleged against him. This court, speaking by Mr. Justice Gray, said: "The petitioner relies on those provisions of the Constitution of the United States which declare that in all criminal prosecutions the accused shall have the right to be tried by an impartial jury of the State and District wherein the crime shall have been committed. *Art.* 3, *sec.* 2; *Amendments, Art.* 6. But the right thereby secured is not a right to be tried in the District where the accused resides, or even in the District in which he is personally at the time of committing the crime, but in the District 'wherein the crime shall have been committed.' . . When a crime is committed partly in one District and partly in another it must, in order to prevent an absolute failure of justice, be tried in either District, or in that one which the Legislature may designate; provided, that 'when any offense against the United States is begun in one judicial District and completed in any other, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined and punished in either District, in the same manner as if it had been actually and wholly committed therein.' *Rev. Stat.* § 731." In that case the court said it was universally admitted that when a shot fired in one jurisdiction strikes a person in another jurisdiction, the offender may be tried where the shot takes effect.

If the sending by the defendant to the Rialto Company from Chicago to St. Louis of the offer above referred to was the beginning of negotiations for an agreement in violation of section 1782, the agreement between the parties was completed at the time of the acceptance of the defendant's offer at St. Louis on November 18th 1902. Then the offense was committed, and it was committed, at St. Louis, notwithstanding the defendant was not personally present in Missouri when his offer was accepted and the agreement was completed.

The principle announced in Palliser's case was reaffirmed in *Horner* v. *United States*, 143 *U. S.* 207, in which it was held that the District Court of the United States in Illinois had jurisdiction to try one charged with having violated the statute relating to the sending of lottery matter in the mails, in that he had unlawfully caused to be delivered to a certain person in that District lottery circulars conveyed by mail in a sealed letter that he had deposited in the mail at New York, addressed to and to be delivered to such person in Illinois. The fact that the accused was in New York when the lottery circulars were mailed, and not personally present in Illinois when the offense was completed by the delivery there of the lottery circulars to the person to whom they were sent, was held to be immaterial and not to defeat the jurisdiction of the Federal court in Illinois to try the accused.

It cannot be maintained, according to the adjudged cases, that the personal absence of the defendant Burton from St. Louis, at the time his offer was accepted, and when the agreement between him and the company was completed and became binding, as between the parties, deprived the Federal court there of jurisdiction. He sent his offer to St. Louis with the intent that it should be there accepted and consummated. Having been completed at that city in conformity with the intention of both parties, an offense was, in the eye of the law, committed there, and when the court below assumed jurisdiction of this case it did not offend the constitutional requirement that a crime against the United States shall be tried in the State and District where it was committed.

Other questions were discussed by counsel, but we have alluded to all involving the substantial rights of the accused that are mentioned in their briefs of points and authorities, and which we deem it necessary to notice.

Mr. Justice McKenna concurs in the judgment based on the count charging the receipt of forbidden compensation, but does not concur in the judgment on the count charging simply an agreement to receive compensation. He is of opinion that the agreement to receive and the receipt of compensation constitute under the circumstances of this case but one offense.

*Judgment affirmed.*

True copy.

Test:

*Clerk Supreme Court, U. S.*

# Supreme Court of the United States.

No. 539.—October Term, 1905.

Joseph Ralph Burton, Plaintiff in Error, vs. The United States. } In error to the Circuit Court of the United States for the Eastern District of Missouri.

[May 21, 1906.]

Mr. Justice Brewer dissenting.

A conviction of plaintiff in error on an indictment charging substantially the same offenses as are charged in the present case was reversed by this court. 196 U. S. 283. In the opinion then filed it was stated that four Justices of this court (the writer of this being among the number) were of the opinion that the matters charged against the defendant were not made offenses by the statute under which the indictment was found. Nothing was said in that opinion in respect to this matter beyond the simple statement of the conclusions of the several Justices. As one of the four I think the importance of the case justifies me in stating the reasons which led to that conclusion, and which induces belief that the present conviction is wrongful.

The statute (sec. 1782, Rev. Stat.) forbids a Senator or other official of the Government to "receive or agree to receive any compensation whatever, directly or indirectly, for any services rendered, or to be rendered, to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party, or directly or indirectly interested, before any department, court martial, bureau, officer, or any civil, military, or naval commission whatever." It was charged in the indictment that there was pending in the Post Office Department a proceeding to inquire whether the Rialto Grain and Securities Company was conducting a scheme for obtaining money by false pretences through the mails of the United States and whether a fraud order, as it is called, should be issued against said company, and that the defendant, as a Senator of the United States, unlawfully agreed to receive from the said corporation compensation for services rendered by him in relation to such proceeding before that Department. It was not charged that the United States was a party to the proceeding, nor that it would either make or lose any money or property, whatever might be the result, but only that it was directly and indirectly interested. The question is therefore distinctly presented

whether a proceeding in one of the departments of the Government, in which it does not appear that the United States is pecuniarily interested in the result, will neither make nor lose by the issue of the proceeding, whatever it may be, is one in which it is "directly or indirectly interested." Unless the statute by clear intendment includes the transaction, any extension beyond its meaning so as to include the transaction would be, under the elementary rule governing the interpretation of criminal statutes, simply judicial legislation, as it would be by judicial construction making that a crime which Congress has not so made, and thereupon imposing punishment. *United States* v. *Wiltberger*, 5 Wheat. 77; *Sarlls* v. *United States*, 152 U. S. 570; *United States* v. *Harris*, 177 U. S. 305. There is a certain broad sense in which the word "interest" is sometimes used, which describes the relation which the Government has to the acts of all its officials, to all proceedings in courts or in departments, and indeed to the conduct of all its citizens. It is interested in seeing justice and righteousness obtain everywhere. It is interested in seeing that no wrongful conduct shall prevail. But so is every official and every citizen interested. It is not an interest which separates and distinguishes the Government from the citizens, but it is that interest which all have, whether government or citizens, in the orderly and just management of affairs, in honorable and right living. It is that interest which a father or head of a family has in the good conduct of all the members of his family. But the word "interest" as found in the law books refers to pecuniary profit and loss, and that Congress used the word "interested" in its common legal acceptation is as clear and certain as anything can be.

It is well to inquire in the first place whether the word "interest" or "interested" has a settled legal meaning. A leading case is that of *Inhabitants of Northampton* v. *Smith*, 11 Met. (Mass.) 390, in which was involved the construction of a statute of Massachusetts which provided that when a judge of probate was interested in any case within his jurisdiction the case should be transferred to the most ancient adjoining county. The probate judge transferred the case on the ground that he was one of the inhabitants of the town of Amherst, and that there were in the will which was offered for probate many bequests to charitable purposes for the benefit of persons described as dwelling in the eight towns enumerated, of which Amherst was one. Mr. Chief Justice Shaw, delivering the opinion of the court, said (p. 394):

"If the term 'interest' were used in the loose sense it sometimes is, consisting in a strong and sincere desire to promote all enterprises for the advancement of learning, philanthropy and general charity, or a similar interest, with all good men to repress and put down pernicious and mischievous schemes, no man could be found fit to be intrusted with the administration of justice; for no man can be exempt from such interest."

And again (p. 395):

"2. It must be a pecuniary or proprietary interest, a relation by which, as a debtor or creditor, an heir or legatee, or otherwise, he will gain or lose something by the result of the proceedings, in contradistinction to an interest of feeling or sympathy or bias, which would disqualify a juror. *Smith* v. *Bradstreet*, 16 Pick. 264.

"3. It must be certain, and not merely possible or contingent. *Hawes* v. *Humphrey*, 9 Pick. 350; *Wilbraham* v. *County Commissioners*, 11 Pick. 322; *Danvers* v. *County Commissioners*, 2 Met. 185. It must be direct and personal, though such a personal interest may result from a relation, which the judge holds as the member of a town, parish, or other corporation, where it is not otherwise provided by law, if such corporation has a pecuniary or proprietary interest in the proceedings.

"It may be, and probably is, very true, as the human mind is constituted, that an interest in a question or subject matter, arising from feeling and sympathy, may be more efficacious in influencing the judgment, than even a pecuniary interest; but an interest of such a character would be too vague to serve as a test by which to decide so important a question as that of jurisdiction; it would not be capable of precise averment, demonstration and proof; not visible, tangible or susceptible of being put in issue and tried; and therefore not certain enough to afford a practical rule of action."

In *McGrath* v. *People ex rel. Linnemeyer*, 100 Ill. 464, it was held that:

"The State is not 'interested, as a party or otherwise,' in a proceeding in the nature of a quo warranto to try the title of a person to an office into which it was alleged he had intruded, in any such sense as would give the Supreme Court jurisdiction to hear an appeal in such a proceeding directly from the trial court, under section 88 of the Practice Act. The interest which the State must have in a cause, within the meaning of this section, in order to entitle either party to bring it directly to the Supreme Court from the trial court, is a substantial interest—as, a monetary interest."

In *Evans* v. *Eaton*, 7 Wheat. 356, a patent case, the question was whether a certain witness was competent, the alleged objection being that he was interested, because he might use the alleged invention if the patent was adjudged void, and Mr. Justice Story, speaking for the court, said (p. 425):

"The special notice in this case asserts matter, which if true, and found specially by the jury, might authorize the court to adjudge the patent void; and it is supposed that this constitutes such an interest in Frederick in the event of the cause that he is thereby rendered incompetent. But in this respect Frederick stands in the same situation as every other person in the community. If the patent is declared void, the invention may be used by the whole community, and all persons may be said to have an interest in making it public property. But this results from a general principle of law, that a party can take nothing by a void patent; and so far as such an interest goes, we think it is to the credit and not to the competency of the witness."

In *State* v. *Sutton*, 74 Vt. 12, the case and the ruling is disclosed by the following quotation from the opinion:

"This is an indictment under section 5072 of the Vermont statutes, for defaming this court, and a judgment thereof, and the judges of the court as to said judgment. It is objected that Judge Watson, who sat below, was disqualified by reason of interest in the event of the cause or matter, for that he is one of the judges alleged to have been defamed. It is a pecuniary interest that disqualifies, and Judge Watson is no more interested in this case in that respect than he is in every other criminal case that he tries, and that interest is too small for the law's notice. *State* v. *Batchelder*, 6 Vt. 479. It is said that a judge defamed would be deeply interested to have the respondent convicted, not only that he might be severely punished, but also for the aid it might afford him in the prosecution and maintenance of a civil action for damages. But such an interest does not disqualify."

In *Foreman* v. *Town of Marianna*, 43 Ark. 324, it was held that a judge who was a taxpayer in a town was not disqualified from sitting in a case relating to the annexation of certain territory to the town, the court saying (p. 329):

"A general interest in a public proceeding, which a judge feels in common with a mass of citizens, does not disqualify. If it did, we might chance to have to go out of the State at times for a judge. The 'interest' which disqualifies a judge under the Constitution is not the kind of interest which one feels in public proceedings or public measures. It must be 'a pecuniary or property interest, or one affecting his individual rights, and the liability or pecuniary gain or relief to the judge must occur upon the event of the suit, not result remotely, in the future, from the general operation of laws and government upon the status fixed by the decision."

In *Taylor* v. *Commissioners of Highways etc.*, 88 Ill. 526, the question was who had the right to appeal from the decision of the commissioners of highways in laying out a new road or vacating an old one, and the court said:

"The word 'interested' must receive a reasonable construction, such as will, on the one hand, protect those who have a direct and substantial interest in the matter, and on the other hand, protect the commissioners of highways from unnecessary litigation in defending their action as such, at the suit of persons who may imagine they have an interest, when in fact they have no such interest as was contemplated by the legislature. Every citizen of a county, in one sense, has an interest in the public highways. So, too, it may be said, and properly, that every citizen of the State has an interest in the highways in the different counties of the State. If, therefore, the language of the statute is to be interpreted literally, an appeal might be taken by any citizen of the State. But we apprehend it was not the intention of the legislature that the word 'interested' should receive such a liberal construction. It was, doubtless, intended to give the right of appeal to those persons who had a direct and pecuniary interest not shared by the public at large, such as owned land adjoining the new road laid out or the old one vacated."

In *Chicago, Burlington & Quincy Railroad Company* v. *Kellogg*, 54 Neb. 138, in deciding whether a trial judge was disqualified, this was the ruling:

"A judge is disqualified from acting as such . . . in any case wherein he is interested . . . But the word 'interested,' found in this section of the statute, probably means 'pecuniarily interested,' or at least it means that a judge, to be disqualified from hearing a case, must be in such a situation with reference to it or the parties that he will gain or lose something by the result of the action on trial. It is not claimed that Judge Beall will gain or lose anything from the result of this action. It is not pretended that he has any pecuniary interest in the matter. The argument seems to be that, because he rendered a law judgment, he would naturally be desirous that the same should be sustained, and that, therefore, his inclination would be to defeat this suit. It can never be presumed that a judge will permit his desires or inclinations to control his decision in any manner, and that he tried the case and rendered the judgment which is sought to be vacated by this action does not render him interested and disqualified, within the meaning of said section of the statute."

See also *Commonwealth* v. *O'Neal*, 6 Gray, 343; *Sauls* v. *Freeman*, 24 Fla. 209; *Bowman's Case*, 67 Mo. 146.

In Bouvier's Law Dictionary, vol. 1, p. 651, "interest" is defined:

"The benefit which a person has in the matter about to be decided and which is in issue between the parties. By the term benefit is here understood some pecuniary or other advantage, which if obtained would increase the witness' estate, or some loss, which would decrease it."

In Black's Law Dictionary the definition is (p. 636):

"A relation to the matter in controversy, or to the issue of the suit, in the nature of a prospective gain or loss, which actually does, or presumably might, create a bias or prejudice in the mind, inclining the person to favor one side or the other."

If the word "interested" was not used in this section in this ordinary legal sense, the words "in which the United States is a party, or directly or indirectly interested" are surplusage, because in respect to every proceeding before a department or other tribunal the United States as *parens patriæ* has an interest in what Chief Justice Shaw calls the "loose" sense of the term. Indeed, what significance is there in inserting the words from "contract" to "interested" inclusive unless some distinct limitation was intended? If the language was "in relation to any proceeding before any department, court martial," etc., it would express the intent to exclude Senators from appearance for compensation in any and all matters before the departments. Inserting the clause above referred to obviously means a limitation, and no other limitation is suggested except that which limits it to matters in which the Government is pecuniarily interested. Neither do the words "or any other matter or thing" enlarge the scope of the prohibition so as to take in matters of a different nature. The rule of construction regarding the effect of such words when following an enumeration of subjects is that they are to be held as meaning any other matter or thing of a like or similar nature to those already named, so that all sub-

jects of that kind may be included, and none escape by reason of not being specially named. They do not open the statute to all kinds of matters or things not of the same nature as those already named. Otherwise there would be no sense in the prior enumeration. *Hermance* v. *Supervisors etc.*, 71 N. Y. 481; *People* v. *New York etc. Ry. Co.*, 84 N. Y. 565; *Thomas etc. Insurance Company* v. *Hamilton*, 12 App. Cas. 484.

Doubtless the Government is charged with the supervision of the action of all its officials, but that supervision does not of itself create a pecuniary interest. This court has a supervising control of the lower Federal judicial tribunals. We are interested in seeing that full justice is done in all cases therein. But that duty of supervision and review creates no pecuniary interest, and does not disqualify a single one of us from participating in the consideration of this case.

If it be said that the Government is pecuniarily interested in the postage the amount of which might be affected by the issue of a fraud order, it is enough to say that there is no proof of any such interest. Further, postage is received in payment for services rendered in transportation. If no services are rendered no postage is received. The issue of a fraud order does not put a stop to the carrying of letters. It simply stops the delivery. It may be that when knowledge of the issue of a fraud order becomes widespread, the number of letters may be diminished, but as heretofore said, diminishing the amount of mail matter diminishes likewise the cost thereof. The Government is no more interested in an increase or diminution of the amounts received by railroad and other carriers for transporting the mails, or those received by stamp contractors for the manufacture of stamps, than it is in the fees received by marshals, clerks, and other officers for services rendered to individuals. In any event, opposing a fraud order would not, in the language of the chairman of the House Committee on the Judiciary, hereinafter quoted, be a suit against the Government.

Again, the history of the passage of the bill which culminated in this statute emphasizes the views already expressed. The bill was introduced into the Senate December 23, 1863, by Senator Wade. As prepared it forbade the appearance of a Senator or member of the House of Representatives in any court as well as department, etc. On February 10, 1864, the Committee on the Judiciary reported in favor of striking out the following words (p. 555):

"No member of the Senate or of the House of Representatives of the United States shall, during his continuance in office, hereafter appear or act as counsel, attorney, or agent in any cause or proceeding, civil or criminal, in any court, civil, criminal, military, or naval, or before any commission, in which the United States is a party or directly or indirectly interested, or receive any compensation of any kind, directly or indirectly, for services

of any description rendered by himself or another in relation to any such cause or proceeding;"

and they were stricken out.

On page 561 is this statement by Senator Trumbull, the chairman of the committee:

"This is not a bill to prevent attorneys from practicing in courts of law, but it is a bill to prevent Representatives and Senators in Congress and officers of the Government who are paid for their services from receiving a compensation for advocating claims in the Departments and before the bureaus of the Government, and before courts martial. That is the particular question that is pending."

On p. 2773 in the proceedings of the House it appears:

"Mr. Wilson, from the Committee on the Judiciary, reported back Senate bill No. 28, relating to members of Congress, heads of Departments and other officers of the Government. The bill was read. It prescribes penalties for members of Congress, heads of Departments, or other officers engaging as attorneys or counselors in suits against the Goverment. The bill was ordered to a third reading; and was accordingly read the third time and passed."

While much weight must not be given to the declarations of individual Senators, those which are embodied in the reports of the chairmen of the judiciary committees are certainly entitled to consideration, and they show clearly that the intent of Congress in this enactment was to prevent Senators and other officials of the Government from receiving compensation for assisting in the prosecution of claims against the Government. It would be the height of absurdity to suppose any one believed that a Senator should be debarred from the right of appearing in any court in cases in which the Government is without a pecuniary interest, and yet that was the scope of the bill as originally presented, if the present construction of the statute is sustained.

Further, while it may be true that executive officers are apt to give undue weight to the wishes of Senators, yet there is nothing in this statute to prevent a Senator from exerting all his influence over them. He may prosecute any claims in behalf of his constituents or others, even though the Government is directly and largely pecuniarily interested. He may appear in any matter or proceeding pending before one of the Departments, and there is nothing in the statute to prohibit it. The only restriction is that he must himself have no pecuniary interest in the matter. The denunciation is against his receiving or agreeing to receive compensation for his services. Is it not reasonable to believe that if pecuniary interest on his part is the only bar to his action a like pecuniary interest on the part of the Government is that interest on the other side intended by the statute?

It is said the language of the section is "directly or indirectly interested," but that does not change the fact that the Government must be interested, and interested, as I have shown, refers to some pecuniary interest. It is directly interested when as the result of the proceeding it may make or lose some of its property, as where a claim is prosecuted in the department for a tract of land, or for the allowance of a contract to a higher rather than to a lower bidder. It is indirectly interested when the effect of the ruling may result in pecuniary loss to the Government in some other case to be thereafter presented to the department. It may be that in a pending case the Government is guaranteed against loss, and yet if a certain ruling is established as the ruling of the department it may affect future cases in which there is no such indemnity to the Government, and in those cases it would be indirectly interested. But whatever the line of demarkation between "direct" and "indirect" results, the statute is clear that the Government must be "interested."

Other matters of moment have been discussed by counsel, but as this is fundamental and upon it rests the whole prosecution, I have preferred to express my views on this matter alone. It seems clear to my mind that the construction now given writes into the statute an offense which Congress never placed there. It is a criminal case, and, in such a case above all, judicial legislation is to be deprecated.

I am authorized to say that Mr. Justice WHITE and Mr. Justice PECKHAM concur in these views.

True copy.

Test:

*Clerk Supreme Court, U. S.*